YK Fung Securities Sdn Bhd v James Capel (Far East) Ltd

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO A-02-773-95
SHAIK DAUD, NH CHAN AND MAHADEV SHANKAR JJCA
17 MARCH 1997

Contract — *Securities — Whether forward contract for shares illegal — Whether contract void or unenforceable for public policy reasons — Whether contract contrary to s 84 of the Securities Industry Act 1983 — Securities Industry Act 1983*

Conflict of Laws — *Whether Malaysian law or Singapore law applied to the contract*

Contract — *Damages — Whether nominal damages the proper remedy*

The defendant was a securities dealer based in Ipoh. The terms of the defendant's business licence stipulated that its business had to be conducted only at its Ipoh address, and that it had to comply with all the rules and regulations of the Kuala Lumpur Stock Exchange ('the KLSE'). The plaintiff was a Hong Kong company dealing in securities in Singapore. The defendant contracted to purchase two blocks of shares from the plaintiff, the first for 6m shares in Grand United Holdings Bhd ('the GUH shares') and 5.88m shares in Growth Industrial Holdings Ltd ('the GIH shares'). The total purchase price for both blocks was S$26,433,600.

The defendant drew up a contract which it dated 17 May 1985 showing the purchase of the GUH shares from the plaintiff. On the same day, the defendant entered into a contract to sell the same shares to Orange Grove Pte Ltd Singapore ('Orange Grove'). The plaintiff did not document the sale of the shares to the defendant until 20 May 1985. On 10 June 1985, the defendant sent to Orange Grove a confirmation letter expressing the terms and conditions of the sale, and stating the payment and delivery date of the shares to be 21 November 1985. On 14 June 1985, the plaintiff sent the defendant a similar letter calling for confirmation of the terms and conditions of the plaintiff's contract. The date of payment and delivery of the shares was 21 November 1985. The defendant gave confirmation by its letter dated 24 June 1985 retaining the date of delivery for 21 November 1985 but imposed the terms of the KLSE on the contract and changed the date of payment to 22 November 1985.

On 10 June 1985, the defendant made out its contracts for the sale of the GIH shares to Eastronics Pte Ltd Singapore ('Eastronics') and Orange Grove, and on 11 June 1985, the defendant sent them confirmation letters of the sale. The plaintiff however documented the purchase of the GIH shares on behalf of the defendant only on 11 June 1985 on terms that settlement was to take place on 10 December 1985 and issued a bargain confirmation to the defendant. On 14 June 1985, the plaintiff sent a formal letter to the defendant to confirm the terms and conditions of this transaction.

The letter was worded in similar terms to the plaintiff's earlier letter regarding the GUH shares. The defendant responded with its own letter on the same date but insisted the KLSE terms applied and that the date of payment be changed to 12 December 1985.

To fulfil their contracts with the defendant, the plaintiff bought the shares from a third party and paid them.

In November 198, when the plaintiff attempted to deliver the GUH shares to the defendant and obtain payment, the defendant at first made a part payment and then refused to honour their bargain, stating that it did not have the money. In response to the failure of Pan-Electric to meet its commitments, the stock exchanges in both Singapore and Kuala Lumpur collapsed in the opening days of December 1985. Pan-Electric had a substantial shareholding in GUH and GIH, and thus the shares became worthless. Both the KLSE and the SSE issued notices in early December 1985 which strictly prohibited forward contracts. The dealings between the parties were reported both to the KLSE and the Monetary Authority of Singapore ('the MAS') and they initiated investigations. Shortly thereafter, the defendant entered into a novation agreement with Tan Koon Swan, a substantial shareholder of GUH, who agreed personally to take over all the liabilities of the Pan-Electric Group to the defendant in respect of the shares. Orange Grove and Eastronics were both companies in the Pan-Electric Group. The plaintiff was not a party to the agreement and could only look to the defendant to recover the price of the GUH and GIH shares it had sold to the defendant.

The plaintiff filed a writ in the Ipoh High Court for breach of contract. The defendant submitted that it was not liable to pay on the following grounds: (i) the proper law of the contract was Singaporean law under which the contracts were illegal; (ii) the plaintiff had acted in violation of its licence and Singapore law in failing to disclose it was acting as a principal and the defendant thereby had a right to rescind the contracts under s 34 of the Securities Industry Act 1973 of Singapore ('the Singapore Act'); (iii) that the plaintiff was only entitled to damages and not the price of the shares; and (iv) that the plaintiff was involved in an illegal funding scheme in order to allow the Pan-Electric Group to roll over the shares. After a succession of delays, three amendments to the defence, and a dismissed appeal to the Supreme Court, the trial finally ended in favour of the plaintiff. The trial judge (see [1996] 2 MLJ 97) found that Malaysian law was the proper law of the contracts, and dismissed the allegations of illegality. He commented adversely on the credibility of the key defence witness, Phillip Fung, as well as the failure of the defence to call Tan Koon Swan. He also found the defence under s 34 of the Singapore Act an abuse of process. GUH underwent a reconstruction after the plaintiff had closed its case. The plaintiff sold some of the GUH shares to mitigate its loss. The defendant was ordered to pay S$24,611,985.56 and the plaintiff was ordered to return the unsold shares after payment.

The defendant appealed, contending that: (i) the proper law of the contracts was Singapore law; (ii) the contracts were illegal under both the law of Singapore and Malaysia; (iii) the trial judge had erred in failing to consider the evidence of Tan Kok Liang; (iv) the plaintiff was not a licensed dealer at the time the contracts were made; and (v) incorrect principles had been applied in assessing the true measure of damages payable to the plaintiff, without proper regard to the provisions of the Sale of Goods Act 1957. The defence also submitted that due regard should have been given to the expert evidence on the effect of the relevant laws of Singapore applicable in this case.

Held, dismissing the appeal:

(1) Parties are bound by their pleadings. The defendant could not, after admitting in its pleadings that the plaintiff was licensed, argue the contrary at the trial or in any appeal thereafter (see p 656A).

(2) The trial judge correctly concluded that Malaysian law was the proper law of the contracts. There is a clear distinction between the question of jurisdiction and the issue of proper law. In the present case, the jurisdiction of the Ipoh court was not challenged nor was it suggested that Ipoh was a forum non conveniens. The relevant factors to consider are the territory where the contracts are made, the fact that the defendant could only legally make the contracts in Ipoh and the circumstances showing payment and delivery of the shares in Ipoh where the breach occurred (see p 666C, G–H); *Entores LD v Miles Far East Corp* [1955] 2 QB 327 followed.

(3) The contracts were not illegal. Although the KLSE and SSE had issued notices that forward contracts were illegal, the contracts in question were made before the circulars were issued, and the fact that the KLSE and MAS did not initiate legal action against the parties despite their full knowledge of the transactions indicates that the KLSE and MAS thought there was nothing illegal in the contracts. Furthermore, the plaintiff was not a member of the KLSE and was not bound by its rules. The KLSE rules will only apply to transactions to the extent to which the parties have not contracted otherwise. Here, the parties expressly contracted out of whatever KLSE rules which were inconsistent with their private arrangements (see pp 661B–D and 667E–G); *Huang Chang Hsun Francis v Hwang & Yusoff Securities Sdn Bhd* [1992] 2 MLJ 305 followed.

(4) In any case, since the plaintiff purchased the shares to the order of the defendant and paid for them, the plaintiff was entitled to recover the full price at which the defendant contracted to buy the shares from the plaintiff even though this price was in excess of what the plaintiff had actually paid to acquire them (see p 668D); *Philp v Bernett & Co* (1901) 18 TLR 129 followed.

(5) The total omission of the defence to put or suggest to the plaintiff's director Mr Guarnori that the plaintiff through its directors had actively participated in a funding scheme of Tan Koon Swan's to rig and manipulate the market in the GUH and GIH shares made the defence witnesses' testimony on those accusations worthless (see pp 658I, 659G–I and 660A–F); *AEG Carapiet v A Y Derderian* AIR 1961 Cal 359, *Brown v Dunn* (1893) 6 The Reports 67 and *Chua Beow Huat v PP* [1970] 2 MLJ 29 followed. A B

(6) Unless the circumstances are exceptional, the defence should not be permitted to recall the plaintiff's witnesses for cross-examination after the plaintiff has closed its case (see p 661G–H).

(7) The existence of Singapore statutes, the rules of Singapore institutions and the pronouncement of Singapore courts are 'facts' to be proved by evidence. The effect of their application to the facts of this case is a question of law for the Malaysian court to decide. The evidence of experts on how the Singapore laws and regulations are to be interpreted or applied is 'opinion' evidence which the Malaysian court may accept or reject (see p 663C–D). C D

(8) Expert opinion is only admissible as evidence where the facts upon which that opinion is based have been proved in the trial or must be deemed to be proved. Opinion evidence should not even be offered on the basis of uncontested proven facts unless the foundation for the opinion offered is clearly stated, and is based on credible admissible evidence which will be given at the trial. If the integrity of experts is to be respected, they should desist from suggesting escape routes from liability based on unproven allegations (see p 663E); *Trade Practices Commission v Arnotts Ltd & Ors* (1990) 92 ALR 527 followed. E F

(9) The allegations that the contracts were void or unenforceable by reason of public policy or because they were contrary to s 84 of the Malaysian Securities Industry Act 1983 were without merit and not supported by the evidence. There was no evidence to support the contention that the parties had agreed between them to create a false or misleading appearance of active trading in the shares on the KLSE or anywhere else. The testimony of the defendant's two experts' concerning this issue should be excluded because it was highly prejudicial and had no probative value whatsoever because there was no evidence to show the plaintiff was a party to the scheme. Even if there was a technical violation of the KLSE rules, that did not invalidate those contracts or make them illegal (see pp 668G–I and 669C); *Theresa Chong v Kin Khoon & Co* [1976] 2 MLJ 253 followed. G H

(10) The allegations that the contracts were unenforceable by virtue of the plaintiff's actions in violation of its licence were not supported by the evidence. It must be emphasized that whilst experts can testify as to the interpretation and application of foreign law, the court should be wary of opinion evidence I

which purports to predict how a foreign court will decide issues which have not come before it. The plaintiff complied with reg 19 of the Securities Industry Regulations 1974 (Singapore) because as soon as all the terms and conditions of the contracts crystallized, they did issue their bargain confirmation letters. The defendant did not produce evidence to counter the plaintiff's documents, and hence it must be concluded the plaintiff had acted in accordance with Singapore law (see pp 671G, 673C–D and 674A); *HA Securities v Ng Kong Yeam* [1993] 3 MLJ 489, *Shaw v Groom* [1970] 1 All ER 702 followed; *Anderson Ltd v Daniel* [1972] 1 KB 138 and *FAI Insurance Ltd & Anor v Pioneer Concrete Services Ltd & Ors* [1986] 4 ACLC 698 distinguished.

(11) The defendant's arguments that the plaintiff's failure to disclose it was acting as a principal and thus was in breach of s 34 of the Singapore Act were not supported by the evidence. The defence in s 34 is only available to the defendant if it did not dispose of the securities after purchasing them from the plaintiff. In this case, the shares were immediately sold to Orange Grove and Eastronics (see p 675B–D); *Solloway v Mclaughlin* [1938] AC 247 distinguished.

(12) The defendant's submission that only nominal damages were available to the plaintiff was properly rejected by the trial judge. The plaintiff led evidence that at the date of the breach, the shares were worthless, and the defendant did not counter this evidence. The remedy was in damages subject to such mitigation, as the plaintiff was able to achieve. On the day fixed for completion of the contracts, the market price of the shares was nil. So the damages the plaintiff was entitled to on that date was the full balance of the contract price. The evidence shows that after the defendant repudiated the contracts, the plaintiff tried to mitigate its loss by proposing a sale of the shares to the defendant on mutually acceptable terms, and only when the defendant declined did the plaintiff sell the shares to third parties and give notice to the defendant, inviting further negotiations as regards the unsold shares. The plaintiff was under no general duty to hold onto the shares after the breach in order to get the best price because the measure of damages for a buyer's refusal to accept shares is the difference between contract price and market price on the date fixed for completion. The defendant's insistence that the trial judge and this court should ignore the plaintiff's sales of the GUH shares left the court no choice but to set aside the third and fourth orders of the trial judge (see pp 676I, 677E, 678A–C, I and 679A); *Johnson v Agnew* [1980] AC 367, *Malayan Banking Bhd v Lim Poh Ho & Anor* [1997] 1 MLJ 662 followed; *The Mihalis Angelos* [1970] 3 All ER 125 distinguished.

Per curiam:

Order 25 r 8(1)(b) of the Rules of the High Court 1980 makes it mandatory for the written report of the expert a party wishes to call to be disclosed to the other parties in the action within 10 weeks of the close of the pleadings. This rule, however, only applies in personal injury actions. As a result, in other kinds of actions, the parties can so arrange the conduct of their action as to evade the need to disclose their expert's report until the last moment (see also O 38 r 6). This is very undesirable. There is an urgent need for the rules of our courts to be amended by adding provisions similar to O 38 rr 35–44 of the Rules of the Supreme Court in England. In the meantime, in non-personal injury actions, the parties should ensure that the summons for directions contain specific directives to ensure that all experts' reports are filed and served when the action is entered for trial (see pp 662I and 663A–B).

[**Bahasa Malaysia summary**

Defendan merupakan sebuah peniaga sekuriti yang bertempat di Ipoh. Terma lesen urusniaga defendan mensyaratkan bahawa perniagaan harus dijalankan hanya di alamat Ipoh dan bahawa ia harus mematuhi segala kaedah dan peraturan Bursa Saham Kuala Lumpur ('BSKL'). Plaintif merupakan sebuah syarikat Hong Kong yang berniaga dalam sekuriti di Singapura. Defendan membuat kontrak untuk membeli dua blok saham daripada plaintif, yang pertama untuk 6 juta saham dalam Grand United Holdings Bhd ('saham GUH') dan 5.88 juta saham dalam Growth Industrial Holdings Ltd ('saham GIH'). Jumlah harga belian untuk kedua-dua blok adalah S$26,433,600.

Defendan telah membuat kontrak yang bertarikh 17 Mei 1985 yang menunjukkan belian saham GUH daripada plaintif. Pada hari yang sama, defendan mengikat suatu kontrak untuk menjual saham yang sama kepada Orange Grove Pte Ltd Singapura ('Orange Grove'). Plaintif tidak mendokumenkan jualan saham GUH kepada defendan sehingga 20 Mei 1985. Pada 10 Jun 1985, defendan menghantar sepucuk surat pengesahan kepada Orange Grove yang menyatakan terma dan syarat jualan, dan menyatakan bayaran dan tarikh hantar-serah saham sebagai 21 November 1985. Pada 14 Jun 1985, plaintif menghantar surat pengesahan yang serupa kepada defendan yang meminta pengesahan terma dan syarat kontrak plaintif. Tarikh bayaran dan hantar-serah saham tersebut adalah 21 November 1985. Defendan memberikan pengesahan menerusi surat bertarikh 24 Jun 1985, dengan mengekalkan tarikh hantar-serah untuk 21 November 1985 tetapi mengenakan terma BSKL ke atas kontrak dan menukar tarikh bayaran kepada 22 November 1985.

Pada 10 Jun 1985, defendan membuat kontraknya untuk jualan saham GIH kepada Eastronics Pte Ltd Singapura ('Eastronics') dan Orange Grove, dan pada 11 Jun 1985, defendan menghantar surat pengesahan tentang jualan itu kepada mereka. Walau bagaimanapun, plaintif mendokumenkan belian saham GIH bagi pihak defendan

hanya pada 11 Jun 1985 atas terma bahawa penyelesaian akan berlaku pada 10 Disember 1985 dan mengeluarkan pengesahan tawaran kepada defendan. Pada 14 Jun 1985, plaintif menghantar sepucuk surat rasmi kepada defendan bagi mengesahkan terma dan syarat transaksi ini. Surat itu disusun kata dalam terma yang serupa dengan surat plaintif yang lebih awal mengenai saham GUH. Defendan menjawab dengan surat sendiri pada tarikh yang sama tetapi menegaskan terma BSKL terpakai dan bahawa tarikh bayaran ditukar kepada 12 Disember 1985.

Bagi memenuhi kontrak mereka dengan defendan, plaintif telah membeli saham dari pihak ketiga dan membayar mereka.

Dalam bulan November 1985, apabila plaintif cuba menghantar-serah saham GUH kepada defendan dan memperolehi bayaran, defendan pada mulanya membuat sebahagian daripada bayaran dan kemudiannya enggan menepati janji, dengan menyatakan bahawa ia tidak mempunyai wang. Akibat daripada kegagalan Pan-Electric untuk memenuhi komitmennya, bursa saham di kedua-dua Singapura dan Kuala Lumpur runtuh dalam hari pembukaan bulan Disember 1985. Pan-Electric memegang saham yang banyak dalam GUH dan GIH, dan dengan itu saham menjadi tidak bernilai. Kedua-dua BSKL dan BSS mengeluarkan notis yang melarang kontrak hadapan pada awal bulan Disember 1985. Urusan di antara pihak-pihak dilaporkan kepada kedua-dua BSKL dan Pihak Berkuasa Kewangan Singapura ('PBKS') dan mereka memulakan siasatan. Berikutnya, defendan mengikat perjanjian novasi dengan Tan Koon Swan, seorang pemegang saham GUH, yang sendiri bersetuju untuk mengambil alih segala liabiliti Kumpulan Pan-Electric kepada defendan berhubung dengan saham. Orange Grove dan Eastronics adalah dua buah syarikat dalam Kumpulan Pan-Electric. Plaintif tidak merupakan sebuah pihak kepada perjanjian itu, dan hanya boleh meletakkan harapan kepada defendan untuk mendapat balik harga saham GUH dan GIH yang dijual kepada defendan.

Plaintif memfailkan suatu writ di Mahkamah Tinggi Ipoh untuk kemungkiran kontrak. Defendan berhujah bahawa ia tidak bertanggungjawab membayar atas alasan-alasan berikut: (i) undang-undang wajar kontrak adalah undang-undang Singapura di bawah mana kontrak-kontrak menyalahi undang-undang; (ii) tindakan plaintif melanggar lesennya dan undang-undang Singapura dalam kegagalan plaintif untuk mendedahkan ia bertindak sebagai prinsipal dan dengan itu defendan mempunyai hak untuk membatalkan kontrak-kontrak di bawah s 34 Akta Perindustrian Sekuriti 1973 (Singapura) ('Akta Singapura'); (iii) bahawa plaintif hanya berhak mendapat ganti rugi dan bukan harga saham-saham; dan (iv) bahawa plaintif terlibat dalam suatu rancangan mengumpul wang yang menyalahi undang-undang bagi membolehkan Kumpulan Pan-Electric menambahkan saham-saham. Selepas kelewatan berturut-turut, tiga pindaan kepada pembelaan, dan rayuan kepada Mahkamah Agung yang ditolak, perbicaraan akhirnya tamat memihak kepada plaintif. Hakim perbicaraan (lihat [1996] 2 MLJ 97) mendapati bahawa undang-undang Malaysia adalah undang-undang wajar kontrak, dan menolak pengataan kepenyalahan undang-undang. Beliau memberi komen yang negatif atas kebolehpercayaan saksi pembelaan utama, Phillip Fung, serta kegagalan pihak pembelaan untuk memanggil Tan Koon Swan. Beliau juga mendapati pembelaan di bawah s 34 Akta Singapura merupakan satu penyalahgunaan proses. GUH mengalami pembinaan semula selepas plaintif menutup kesnya. Plaintif menjualkan sebahagian daripada saham GUH bagi mengurangkan kerugiannya. Defendan diperintah supaya membayar S$24,611,985.56 dan plaintif diperintah mengembalikan saham yang tidak dijual selepas bayaran.

Defendan membuat rayuan, dengan menghujahkan bahawa: (i) undang-undang wajar kontrak adalah undang-undang Singapura; (ii) kontrak-kontrak adalah menyalahi undang-undang di bawah kedua-dua undang-undang Singapura dan Malaysia; (iii) hakim perbicaraan telah melakukan kesilapan dalam kegagalan untuk mempertimbangkan keterangan Tan Kok Liang; (iv) plaintif tidak merupakan peniaga berlesen pada masa kontrak-kontrak dibuat; dan (v) prinsip yang tidak betul telah dipakai dalam menaksir pengiraan sebenar ganti rugi yang harus dibayar kepada plaintif, tanpa mengambil kira peruntukan Akta Jualan Barangan 1957. Pihak pembelaan juga berhujah bahawa pertimbangan sepatutnya telah diberikan kepada keterangan pakar atas kesan undang-undang Singapura relevan yang terpakai dalam kes ini.

Diputuskan, menolak rayuan:

(1) Pihak-pihak adalah diikat oleh pliding mereka. Selepas mengakui dalam plidingnya bahawa plaintif adalah berlesen, defendan tidak boleh berhujah sebaliknya di perbicaraan atau dalam mana-mana rayuan selepas itu (lihat ms 656A).

(2) Hakim perbicaraan membuat kesimpulan yang betul bahawa undang-undang Malaysia adalah undang-undang wajar kontrak-kontrak. Terdapat perbezaan yang nyata di antara persoalan bidang kuasa dan isu undang-undang wajar. Dalam kes ini, bidang kuasa mahkamah di Ipoh tidak dicabar dan tidak juga dicadangkan bahawa Ipoh adalah satu forum non conveniens. Faktor-faktor relevan untuk dipertimbangkan adalah wilayah di mana kontrak-kontrak dibuat, fakta bahawa defendan hanya boleh membuat kontrak-kontrak secara sah di Ipoh dan keadaan-keadaan yang menunjukkan bayaran dan hantar-serah saham-saham di Ipoh di mana kemungkiran berlaku (lihat ms 666C, G–H); *Entores LD v Miles Far East Corp* [1955] 2 QB 327 diikut.

(3) Kontrak-kontrak tidak menyalahi undang-undang. Walaupun BSKL dan BSS telah mengeluarkan notis bahawa kontrak hadapan adalah menyalahi undang-undang, kontrak-kontrak berkenaan dibuat sebelum surat pekeliling dikeluarkan, dan fakta bahawa BSKL dan PBKS tidak memulakan apa-apa tindakan undang-undang terhadap pihak-pihak meskipun

mereka tahu akan transaksi menunjukkan bahawa BSKL dan PBKS berpendapat tiada apa yang menyalahi undang-undang dalam kontrak-kontrak. Tambahan pula, plaintif bukanlah ahli BSKL dan tidak diikat oleh kaedah-kaedahnya, dan kaedah-kaedah BSKL hanya terpakai kepada transaksi setakat mana pihak-pihak tidak mengikat kontrak sebaliknya. Di sini, pihak-pihak telah secara nyata menarik diri daripada mana-mana kaedah BSKL yang tidak konsisten dengan aturan persendirian mereka (lihat ms 661B–D dan 667E–G); *Huang Chang Hsun Francis v Hwang & Yusoff Securities Sdn Bhd* [1992] 2 MLJ 305 diikut.

(4) Walau bagaimanapun, oleh kerana plaintif telah membeli saham-saham atas perintah defendan dan membayar untuknya, plaintif berhak mendapat kembali harga penuh pada mana defendan telah berjanji membeli saham-saham dari plaintif sungguhpun harga ini melebihi apa yang sebenarnya dibayar oleh plaintif bagi mendapatkannya (lihat ms 668D); *Philp v Bernett & Co* (1901) 18 TLR 129 diikut.

(5) Peninggalan sepenuh pihak pembelaan untuk memberitahu atau mencadangkan kepada pengarah plaintif En Guarnori bahawa plaintif melalui pengarah-pengarahnya telah menyertai skim Tan Koon Swan secara aktif untuk melakukan penipuan dan memanipulasikan pasaran dalam saham-saham GUH dan GIH, menjadikan testimoni saksi-saksi pihak pembelaan atas dakwaan itu tidak berguna (lihat ms 658I, 659G–I dan 660A–F); *AEG Carapiet v AY Derderian* AIR 1961 Cal 359, *Brown v Dunn* [1893] 6 The Reports 67 dan *Chua Beow Huat v PP* [1970] 2 MLJ 29 diikut.

(6) Melainkan keadaan-keadaan adalah luar biasa, pihak pembelaan tidak patut dibenarkan memanggil semula saksi-saksi plaintif untuk pemeriksaan balas selepas plaintif telah menutup kesnya (lihat ms 661G–H).

(7) Kewujudan statut Singapura, kaedah-kaedah institusi Singapura dan perisytiharan mahkamah Singapura adalah 'fakta' untuk dibuktikan oleh keterangan. Kesan pemakaian mereka kepada fakta-fakta kes ini merupakan satu persoalan undang-undang untuk diputuskan oleh mahkamah di Malaysia. Keterangan pakar-pakar tentang bagaimana undang-undang dan peraturan Singapura patut ditafsir atau dipakai adalah keterangan 'pendapat' yang mungkin boleh diterima atau ditolak oleh mahkamah di Malaysia (lihat ms 663C–D).

(8) Pendapat pakar hanya boleh diterima sebagai keterangan di mana fakta atas mana pendapat itu didasarkan telah dibuktikan di perbicaraan atau mestilah dianggap telah dibuktikan. Keterangan pendapat tidak patut diberikan berdasarkan fakta terbukti yang tidak dicabar melainkan asas untuk pendapat yang diberikan dinyatakan dengan jelas, dan adalah berdasarkan keterangan boleh diterima yang boleh dipercayai yang akan diberikan di perbicaraan. Jika integriti pakar-pakar ingin dihormati, mereka seharusnya berhenti daripada mencadangkan

cara pelepasan dari liabiliti berdasarkan pengataan yang tidak dibuktikan (lihat ms 663E); *Trade Practices Commission v Arnotts Ltd & Ors* (1990) 92 ALR 527diikut.

(9) Pengataan bahawa kontrak-kontrak adalah tak sah atau tidak boleh dikuatkuasakan disebabkan polisi awam atau kerana mereka bertentangan dengan s 84 Akta Perindustrian Sekuriti 1983 (Malaysia) adalah tanpa merit dan tidak disokong oleh keterangan. Tiada bukti bagi menyokong hujah bahawa pihak-pihak telah bersetuju sesama mereka untuk mewujudkan gambaran jual beli aktif yang palsu atau mengelirukan dalam saham-saham BSKL atau di mana-mana tempat lain. Testimoni dua pakar defendan mengenai isu ini patut dikecualikan kerana ia amat memudaratkan dan tidak mempunyai apa-apa nilai probatif kerana tiada keterangan bagi menunjukkan plaintif merupakan suatu pihak kepada rancangan ini. Jika pun terdapat pelanggaran teknikal kaedah-kaedah BSKL, itu tidak menjadikan kontrak-kontrak tak sah atau membuatnya menyalahi undang-undang (lihat ms 668G–I dan 669C); *Theresa Chong v Kin Khoon & Co* [1976] 2 MLJ 253 diikut.

(10) Pengataan bahawa kontrak-kontrak tidak boleh dikuatkuasakan disebabkan perbuatan plaintif yang melanggar lesennya tidak disokong oleh keterangan. Ia mesti dititikberatkan bahawa walaupun pakar-pakar boleh memberi keterangan tentang tafsiran dan pemakaian undang-undang asing, mahkamah harus berjaga-jaga tentang keterangan pendapat yang dikatakan boleh meramalkan bagaimana sebuah mahkamah asing akan memutuskan isu-isu yang belum dikemukakan di hadapannya. Plaintif telah mematuhi peraturan 19 Peraturan-Peraturan Perindustrian Sekuriti 1974 (Singapura) sebab sebaik sahaja kesemua terma dan syarat kontrak-kontrak dibentuk, mereka telah mengeluarkan surat pengesahan tawaran. Defendan tidak mengemukakan keterangan bagi mencabar dokumen-dokumen plaintif, dan justeru itu ia mesti disimpulkan plaintif telah bertindak menurut undang-undang Singapura (lihat ms 671G, 673C–D dan 674A); *HA Securities v Ng Kong Yeam* [1993] 3 MLJ 489, *Shaw v Groom* [1970] 1 All ER 702 diikut; *Anderson Ltd v Daniel* [1972] 1 KB 138 dan *FAI Insurance Ltd & Anor v Pioneer Concrete Services Ltd & Ors* [1986] 4 ACLC 698 dibeza.

(11) Hujah defendan bahawa kegagalan plaintif untuk mendedahkan ia bertindak sebagai prinsipal dan oleh itu memungkiri s 34 Akta Singapura tidak disokong oleh keterangan. Pembelaan dalam s 34 hanya boleh digunakan oleh defendan jika ia tidak melupuskan sekuriti selepas membelinya daripada plaintif. Dalam kes ini, saham-saham dijual dengan segera kepada Orange Grove dan Eastronics (lihat ms 675B–D); *Solloway v Mclaughlin* [1938] AC 247 dibeza.

(12) Hujah defendan bahawa hanya ganti rugi nominal boleh didapati oleh plaintif telah ditolak dengan betul oleh hakim perbicaraan. Plaintif mengemukakan keterangan bahawa pada tarikh kemungkiran, saham-saham adalah tidak bernilai, dan defendan

tidak mencabar keterangan ini. Remedi adalah dalam ganti rugi tertakluk kepada peringanan sedemikian, yang telah pun dapat dicapai oleh plaintif. Pada hari yang ditetapkan untuk penyempurnaan kontrak-kontrak, harga pasaran saham-saham adalah kosong. Jadi ganti rugi yang boleh dituntut oleh plaintif pada tarikh itu adalah baki penuh harga kontrak. Keterangan menunjukkan bahawa selepas defendan menolak kontrak-kontrak, plaintif cuba mengurangkan kerugian dengan mencadangkan jualan saham-saham kepada defendan atas terma yang saling boleh diterima, dan hanya apabila defendan menolak cadangan itu barulah plaintif menjual saham-saham kepada pihak ketiga dan memberi notis kepada defendan, dan melawa perundingan lanjut berhubung dengan saham-saham yang belum dijual. Plaintif tidak berada di bawah sebarang kewajipan am untuk terus memegang saham-saham selepas kemungkiran bagi mendapatkan harga yang paling baik kerana penentuan ganti rugi untuk keengganan seorang pembeli untuk menerima saham-saham adalah perbezaan di antara harga kontrak dan harga pasaran pada tarikh yang ditetapkan untuk penyempurnaan. Pendesakan defendan bahawa hakim perbicaraan dan mahkamah ini harus mengabaikan jualan saham GUH oleh plaintif meninggalkan tiada pilihan kepada mahkamah kecuali mengetepikan perintah ketiga dan keempat hakim perbicaraan (lihat ms 676I, 677E, 678A–C, I dan 679A); *Johnson v Agnew* [1980] AC 367, *Malayan Banking Bhd v Lim Poh Ho & Anor* [1997] 1 MLJ 662 diikut; *The Mihalis Angelos* [1970] 3 All ER 125 dibeza.

Per curiam:

Aturan 25 k 8(1)(b) Kaedah-Kaedah Mahkamah Tinggi 1980 menjadikannya mandatori bahawa laporan bertulis pakar yang ingin dipanggil oleh sesebuah pihak didedahkan kepada pihak lain dalam tindakan dalam tempoh 10 minggu dari penutupan pliding. Walau bagaimanapun, kaedah ini hanya terpakai dalam tindakan kecederaan diri. Akibatnya, dalam tindakan yang lain, pihak-pihak boleh mengatur pengelolaan tindakan mereka supaya mengelak keperluan untuk mendedahkan laporan pakar mereka sehingga saat-saat terakhir (lihat juga A 38 k 6). Ini sungguh tidak diingini. Terdapat keperluan untuk meminda kaedah-kaedah mahkamah kita dengan menambah peruntukan yang serupa dengan A 38 kk 35–44 Kaedah-Kaedah Mahkamah Agung di England. Sementara itu, dalam tindakan bukan kecederaan diri, pihak-pihak harus memastikan bahawa saman untuk arahan mengandungi arahan-arahan yang spesifik bagi menentukan segala laporan pakar difailkan dan dikemukakan apabila tindakan dimasukkan untuk perbicaraan (lihat ms 662I dan 663A–B).]

Notes

For cases on conflict of laws in a contract case, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 573–593 and 2 *Mallal's Digest* (4th Ed, 1994 Reissue) para 2110.

For cases on illegal contracts, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1733–1810.

For cases on expert evidence, see 7 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 919–922.

For cases on breach of contract, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1445–1451.

Cases referred to

AEG Carapiet v AY Derderian AIR 1961 Cal 359 (folld)
Amin Rasheed Shipping Corp v Kuwait Insurance Co [1984] 1 AC 50 (refd)
Anderson Ltd v Daniel [1972] 1 KB 138 (distd)
BP Exploration (Libya) Ltd v Hunt [1976] 3 All ER 879 (refd)
Brown v Dunn [1893] 6 The Reports 67 (folld)
Chua Beow Huat v PP [1970] 2 MLJ 29 (folld)
Entores LD v Miles Far East Corp [1955] 2 QB 327 (folld)
Eng Liat Kiang v Eng Bak Hern & Ors [1995] 1 SLR 577 (refd)
FAI Insurance Ltd & Anor v Pioneer Concrete Services Ltd & Ors (1986) 4 ACLC 698 (distd)
Gherulal Parakh v Mahadeodas Maiya & Ors AIR 1959 SC 781 (refd)
HA Securities v Ng Kong Yeam [1993] 3 MLJ 489 (folld)
Huang Chang Hsun Francis v Hwang & Yusoff Securities Sdn Bhd [1992] 2 MLJ 305 (folld)
Inter Maritime Sdn Bhd v Kai Tai Timber Co Ltd Hong Kong [1995] 1 MLJ 322 (refd)
James Capel (Far East) Ltd v YK Fung Securities Sdn Bhd [1996] 2 MLJ 97 (refd)
Johnson & Anor v Agnew [1980] AC 367 (folld)
MacMillan Inc v Bishopsgate Investment Trust plc & Ors (No 3) [1995] 3 All ER 747 (refd)
Malayan Banking Bhd v Lim Poh Ho & Anor [1997] 1 MLJ 662 (folld)
Monkland v Jack Barclay Ltd [1951] 2 KB 252 (refd)
Mihalis Angelos, The [1970] 3 All ER 125 (distd)
Philp v Bernett & Co [1901] 18 TLR 129 (folld)
PP v Tan Koon Swan [1981] 1 MLJ 18 (refd)
Shaw v Groom [1970] 1 All ER 702 (folld)
Solloway v McLaughlin [1938] AC 247 (distd)
Spiliada Maritime Corp v Cansulex Ltd [1987] 1 AC 460 (refd)
Sykt Soon Theam Sdn v H'ng Chye Jin [1975] 1 MLJ 259 (refd)
Theresa Chong v Kin Khoon & Co [1976] 2 MLJ 253 (folld)
Trade Practices Commission v Arnotts Ltd & Ors (1990) 92 ALR 527 (folld)

Legislation referred to

Civil Law Act 1956 s 11
Contracts Act 1950 s 24(e)
Evidence Act 1950 ss 114(g), 145, 157
Rules of the High Court 1980 O 25 r 8(1)(b), O 38 r 6
Sale of Goods Act 1957 ss 36, 55, 55(1), (2), 56
Securities Industry Act 1973 s 9
Securities Industry Act 1983 ss 24, 84, 91, 100
British Contract (Applicable Law) Act 1990 [UK]

A Finance Act 1986 ss 61(1), (2), (3), 63(1) [UK]
Financial Services Act 1986 s 63(1) [UK]
Rules of the Supreme Court O 38 rr 35–44 [UK]
Securities Industry Act 1973 ss 9, 14, 20(2), 34, 34(3) [Sing]
Securities Industry Regulations 1973 regs 13, 19 [Sing]

B **Appeal from**: Suit No 23–202–86 (High Court, Ipoh)

Cecil Abraham and *Chan Kok Keong* (*Chan & Associates*) for the appellant.
N Chandran (*Adnan Sundra & Low*) for the respondent.

C **Mahadev Shankar JCA** (delivering the judgment of the court): YK Fung Securities Sdn Bhd (the appellant — hereinafter 'the defendant') bought two blocks of shares from James Capel (Far East) Ltd ('the plaintiff'). The first block was for 6m shares in Grand United Holdings Bhd ('the GUH shares'). The second was for 5.88m shares in Growth Industrial Holdings D Ltd ('the GIH shares'). The total purchase price was S$26,433,600 (the equivalent in ringgit then was over RM30m). When the time to pay and take delivery came, the defendant at first made a part payment and then refused to honour their bargain. The only reason given for this at the time by the defendant was that they did not have the money. On 28 May 1986, the plaintiff filed a writ in the High Court at Ipoh. Judgment was only E delivered 9½ years later. The defence was amended three times as the trial progressed. The fourth application to amend was refused. The trial was halted pending an appeal to the (then) Supreme Court which was dismissed. The trial (not counting the interlocutory applications) consumed 17 days. The trial judge ordered the defendant to pay up (see [1996] 2 MLJ 97). F We dismissed the defendant's appeal. Our reasons now follow.

The backdrop of this case is the collapse of Pan-Electric Industries Ltd ('Pan-El') and the activities of one Tan Koon Swan and his associates. The complexity and timing of the successive amendments to the defence can only be properly understood if all the facts are first spelt out.

G

The facts which cannot be disputed

The defendant was carrying on the business of dealing in securities at No 64 Clarke Street, Ipoh. The dealer's licence issued to it on 25 May 1985 reads in material particular as follows:

H

Securities Industry Act 1973 (Act 112)
(Section 9)

Dealer's Licence

I Mr Fung Yan Khai
of 251 Jalan President Kennedy,
Off Jalan Kampar, Ipoh

is licensed under the Securities Industry Act 1973, subject to the following conditions:

The licensee, Mr Fung Yan Khai:

> (1) shall not carry on a business of dealing in securities otherwise than as a director of YK Fung Securities Sdn Bhd; and such business *shall only* be carried on at 65 Clarke Street, Ipoh;
>
> (2) shall not establish any branch;
>
> (3) shall immediately notify the Registrar of Companies of any change of the name or style under which his business of dealing in securities is carried on;
>
> (4) shall comply with all the rules and regulations of the Kuala Lumpur Stock Exchange; and
>
> (5) shall return the licence to the Registrar of Companies if the licence be cancelled, revoked or suspended for any reason whatsoever.

The plaintiff is a Hong Kong company carrying on the business of dealing in securities in Singapore. On 1 June 1984, the Singapore Registrar of Companies issued the plaintiff with a dealer's licence under the Securities Industry Act 1973 of Singapore ('the Singapore Act') to remain in force for a year until 31 May 1985. It reads as follows:

> Securities Industry Act 1973
> (Section 14)
>
> Dealer's Licence
>
> James Capel (Far East) Ltd
> of 4 Raffles Quarry #05–00 Finlayson Green House, Singapore 0104
>
> is hereby licensed as a dealer under the Securities Industry Act 1973, subject to the following conditions:
>
> (1) that the licensee shall forthwith notify the registrar of any change of its directors or secretary or in respect of its members or shareholding of its members;
>
> (2) that the licensee shall forthwith inform the registrar of any matter which may adversely affect its financial position;
>
> (3) that the licensee shall deal only in securities not quoted on the Stock Exchange of Singapore Ltd; and in the case of securities, including foreign securities, quoted on the Stock Exchange of Singapore Ltd, to deal in them only through licensed dealers who are members of the Stock Exchange of Singapore Ltd; and
>
> (4) that the licensee shall, at its own expense, subject itself to a surprise audit by an independent auditor to be selected by the registrar.
>
> Unless previously cancelled, this licence will remain in force for a period of one year until 31 May 1985.
>
> Given under my hand and seal at Singapore, this 1 June 1984.

Thereafter, the functions of the Registrar of Companies under the Singapore Act were transferred to the Monetary Authority of Singapore ('the MAS'). Before its 1984/85 licence expired, the plaintiff applied for its renewal, and on 31 October 1985 the MAS did so. The four conditions stipulated in the dealer's licence remained the same.

Section 20(2) of the Singapore Act provides:

> ... a licence that has been renewed in accordance with the provisions of this Part shall continue in force for a period of 12 months next succeeding the date upon which but for its renewal it would have expired.

(The Securities Industry Act 1983 of Malaysia ('the Malaysian Act') (in force on 7 July 1983) is largely in pari materia with the Singapore Act. The corresponding section in the Malaysian Act is s 24).

From 1 July 1985 until 31 January 1989, Anthony Peter Guarnori ('Guarnori') was the managing director of the plaintiff. He had been a stockbroker since 1958. The plaintiff's letters in June 1985 show its directors then to be FJ Fergusson, KF Lucas, AS Montgomery and FC Fiducia. Lau Wai Kwok was an associate director.

The defendant was a member of the Kuala Lumpur Stock Exchange ('the KLSE'). At the material time, the managing director of the defendant was Syed Khairuddin bin Syed Hassan ('Syed'). Fung Yik Pun ('Phillip Fung') was the defendant's financial controller. He is the son of Fung Yan Khai and regarded the defendant's activities as his father's business. Mandy Fung was the defendant's assistant general manager.

The Pan-Electric Group

Peter Tham was the substantive shareholder and controller of the Pan-Electric Group in 1984. He also owned the majority shares in a firm of Singapore brokers called 'Associated Asian Securities' in which he was an executive director. Peter Tham also had a substantial shareholding in Growth Industrial Holdings Ltd ('GIH') which held a controlling interest in Pan-Electric. Tan Kok Liang was the financial director of the Pan-Electric Group and financial controller of GIH.

Tan Koon Swan was the substantial shareholder of Grand United Holdings Bhd ('GUH').

One Michael Huang Heng Shu also figures in this story. He appears to be closely connected with the defendant. His address in May 1985 was with Wesco Chemicals (M) Sdn Bhd at Menara Promet, Kuala Lumpur (see 2AR 284). Phillip Fung had also referred to one Tan See Cheng. He was the general manager of Seacorp Trading, a trust investment company. He is said to have died in 1990.

The transactions — The contract documents relating to the GUH shares

According to the defendant's 12 contracts dated 17 May 1985 and numbered 45042S to 45053S (inclusive), the defendant 'sold' 6m GUH shares 'by order and for the account of' James Capel & Co, Winchester House, Old Broad Street, London EC 2N 1BQ (Note: not James Capel (Far East) Ltd Singapore). Each of these was for 500,000 GUH shares. Phillip Fung said he issued them. He said he believed he was dealing with an English broker from London. The price stated is S$1.74. There is no commission stated. Phillip Fung referred to these documents as contract notes.

According to another 12 of the defendant's contracts also dated 17 May 1985 and numbered 45030S to 45041S (inclusive), the defendant 'bought by order and for account of Orange Grove Property Pte Ltd Singapore' ('Orange Grove') 6m GUH shares and the price stated is S$1.75. One per cent brokerage was charged so the defendant's remuneration was S$105,000. Each of these documents carried an entry, 'Married (Ctrt FB Trading Period: 12'. It will be noted that the James Capel contracts and the Orange Grove contracts ran in a series from 45030S to 45053S with the Orange Grove number coming first. The signatory of these contracts was not identified. It could be Mr Fung Yan Khai as the licensed dealer. A B

The plaintiff's documents start with a 'dealing slip' dated 20 May 1985. This was an internal memo of the plaintiff's. It states the defendant is the client for 6m GUH shares to a limit of S$1.74. The person to contact in the defendant's set-up is Mandy Fung. The other significant detail under 'Remarks' is 'Settlement date 21 November 1985 for record purposes (bargain confirmation only)'. There are other details on this slip to confirm that the plaintiff was to get from the National Australian Bank Ltd ('the NAB') 2,258,000 of the shares at S$1.8293, 840,000 shares at S$1.6152 from Michael Huang, and 2,580,000 shares at S$1.74 from Lin Securities (Pte). A second dealing slip also dated 20 May 1985 shows that the 2,580,000 shares from the NAB was to be purchased through Kay Hian. On 20 May 1985, the plaintiff issued a 'bargain confirmation' of the transaction to the NAB and Lin Securities. The bargain confirmation to Michael Huang is dated 22 May 1985. These 'bargain confirmations' are in standard printed form stating that the plaintiff's 'agents have sold' for the customer's account the shares in question and that the settlement date was to be 21 November 1985. Each bargain confirmation also stated, 'You will receive a contract note in due course'. C D E

Yet another document of the plaintiff's shows the workings of the plaintiff's sources and cost of S$10,335,558 and the sale thereof to the defendant at S$10,440,000. The net gain to the plaintiff is shown as 'Difference: $104,442 (Commission earned?)'. This figure, for practical purposes, is 1% of the total sales consideration, ie the identical rate the defendant had charged Orange Grove. F

So far as the GUH shares were concerned, the plaintiff issued on 20 May 1985 a bargain confirmation to the defendant at Ipoh that 'we/our agents have today bought' for the defendant's account 6m GUH shares at S$1.74 net for S$10,440,000 and settlement was on 21 November 1985. G

Next, the defendant sent a letter to Orange Grove in Singapore dated 10 June 1985. It is headed: H

> Terms and conditions for the purchase of 6m shares in Grand United Holdings Bhd on 17 May 1985.

Then follow details of the date, contract numbers, quantity price and amount in figures. The letter continues: I

> We would like to confirm our telecon arrangement in respect of the terms and conditions which are enumerated as follows:
>
> 1 The delivery date of the shares will be on 21 November 1985.

2 The full consideration for the total 6m shares purchased, as aforesaid, amounting to S$10,615,500 will be paid on 21 November 1985 on receipt of the said shares.

3 The transaction is on a cum-all basis whereby all entitlement received by us will be for your account. In the event of a rights issue during the period of contract, you will undertake to provide the necessary fund for the rights issue. If the rights issue funds are not received by us in adequate time for the application, we reserve the right to renounce the rights entitlement or to apply for the rights issue which will be for our own account and you shall have no claims of whatsoever kind.

4 As the contract is on a time-bargain basis, you will accept delivery of the shares and make payment for the same notwithstanding any restructuring or suspension of the shares during the period of the contract or at the time of delivery.

If this letter correctly states the terms and conditions agreed upon, please sign the attached copy of the same, and return it to us.

Please note that the terms and conditions of the Stock Exchange of Kuala Lumpur shall apply to this contract so long as there is nothing inconsistent therewith and the terms herein stated.

Yours faithfully

—Sgd—
Mandy Fung
Assistant General Manager

We accept the above terms and conditions,

—Sgd—
Orange Grove Pte Ltd

The plaintiff sent a letter to the defendant on 14 June 1985 regarding the 6m GUH shares. It reads:

14 June 1985

YK Fung Securities Sdn Bhd
65 Clarke Street
Ipoh
Malaysia

Attn: Mr Phillip Fung

Dear Sirs

Re: Terms and conditions for the purchase of 6m shares in Grand United Holdings Bhd at S$1.74 per share

We refer to the agreement between yourself and our Mr Lau Wai Kwok regarding the above-mentioned matter.

We state below the terms and conditions in regard *to the purchase by you from us* of 6m shares in Grand Holdings Bhd at S$1.74 per share. (Emphasis added.)

1 The delivery date of the shares will be on 21 November 1985.

2 The full consideration for the total shares purchased, as aforesaid, amounting to S$10,440,000 will be paid to us on 21 November 1985. A

3 The transaction is on a cum-all basis whereby all entitlement received by us will be for your account. In the event of a rights issue during the period of contract, you will undertake to provide the necessary fund for the rights issue. If the rights issue funds are not received by us in adequate time for the application, we reserve the right to renounce the rights entitlement or to apply for the rights issue which will then be for our own account, and you shall have no claims of whatsoever kind. B

4 As the purchase contract is on a time-bargain basis, you will accept delivery of the shares and make payment for the same notwithstanding any restructuring or suspension of the shares during the period of the contract or at the time of delivery. C

Kindly confirm the above-mentioned terms and conditions agreed upon by signing the duplicate copy of this letter and returning it to us.

Please note that the terms and conditions of the Stock Exchange of Singapore Ltd shall apply to this contract so long as there is nothing inconsistent therewith and the terms herein stated. D

Yours faithfully
James Capel (Far East) Ltd

—Sgd—
Lau Wai Kwok E
Associate Director

We hereby agree to the above terms
and conditions for and on behalf of
YK Fung Securities Sdn Bhd

F

....

The following observations are relevant. The defendant's letter to Orange Grove confirmed that the sale of the 6m GUH shares was on 17 May 1985. Since the contract numbers are all given, there is no question about the shares not being the same shares purportedly bought from James Capel (London). The letter is signed by Mandy Fung. G

The plaintiff's letter about the same quantity of GUH shares came four days later. There is a marked similarity in the contents of this letter with that in the defendant's letter to Orange Grove; but the language is not identical. Unlike the defendant's letter to Orange Grove, it is obvious that the terms and conditions of the plaintiff's contract were yet to be concluded by way of confirmation from the defendant. The last two paragraphs are especially significant because by its letter dated 24 June 1985, the defendant imposed their own terms and conditions for the purchase of these 6m GUH shares. The letter reads as follows: H

I

24 June 1985

James Capel (Far East) Ltd
20 Collyer Quay #11–01
Tung Centre, Singapore 0104

Attn: Mr Lau Wai Kwok

Dear Sir

Re: Terms and conditions for the purchase of 6m shares in Grand United Holdings Bhd at S$1.74 per share

We state below the terms and conditions in regard to the purchase by us from you of 6m shares in Grand United Holdings Bhd at S$1.74 per share.

1 The delivery date of the shares will be on 21 November 1985.

2 The full consideration for the total shares purchased, as aforesaid, amounting to S$10,440,000 will be paid to you on 22 November 1985.

3 The transaction is on a cum-all basis whereby all entitlement received by you will be for our account. In the event of a rights issue during the period of contract, we will undertake to provide the necessary fund for the rights issue. If the right issue funds are not received by you in adequate time for the application, you reserve the right to renounce the rights entitlement or to apply for the rights issue which will then be for your own account, and we shall have no claims of whatsoever kind.

4 As the purchase contract is on a time-bargain basis, we will accept delivery of the shares and make payment for the same notwithstanding any restructuring or suspension of the shares during the period of the contract or at the time of delivery.

Kindly confirm the above-mentioned terms and conditions agreed upon by signing the duplicate copy of this letter and returning it to us.

Please note that the terms and conditions of the Stock Exchange of Kuala Lumpur shall apply to this contract so long as there is nothing inconsistent therewith and the terms herein stated.

Yours faithfully,
YK Fung Securities Sdn Bhd

—Sgd—
Syed Khairuddin bin Syed Hassan
Managing Director

We hereby agree to the above terms and conditions for and on behalf of James Capel (Far East) Ltd

....

The defendant changed the date for payment of 22 November 1985 and significantly by the last paragraph, the defendant insisted that the terms of the KLSE shall apply. The signatory now is Syed.

The GIH shares

Once again, the defendant's documentations preceded the plaintiff's. On 10 June 1985, the defendant made 10 contracts numbered 46515S to 45624S for 2,940,000 GIH shares at S$2.72 each. The documents say they were 'sold by order and for the account of James Capel London'. The same day, the defendant made 10 contracts 46505S to 46514S stating that the same number of GIH shares in the same quantities were 'bought by order and for the account of Eastronics Pte Ltd Singapore'. Their address was the same as Orange Grove's. The price was S$2.74 per share. The defendant's gain here was two cents per share profit and a further 1% brokerage which gave a projected yield of S$58,800 profit and S$80,556 commission or S$139,356. These contract documents state 'Married Ctrt FB Trading Period: 14'.

Similarly, on 10 June 1985, the defendant issued 10 contracts 'sold by order and for the account of James Capel & Co London' Nos 46485S to 46494S for 2,940,000 GIH shares at S$2.72. Simultaneously, the defendant issued 10 contracts Nos 46495S to 46504S 'bought by order and for the account of' Orange Grove for the same quantity at S$2.74 with 1% commission. These are also stated to be 'Married Ctrt'. The defendant's projected gain was thus S$278,712.

On 11 June 1985, the defendant wrote a letter to Orange Grove and another to Eastronics in identical terms to confirm these transactions. (These letters are similarly worded to the earlier letter dated 10 June 1985 to Orange Grove for the 6m GUH shares. Again, they were signed by Mandy Fung.

The plaintiff's documentation for the GIH shares was as follows. On 11 June 1985, it documented the purchase of 5.88m GIH shares at S$2.72 for YK Fung Securities Sdn Bhd for settlement on 10 December 1985 at a total cost of S$15,993,600. The same day, it issued a bargain confirmation to the defendant. These shares were to be obtained from Lin Securities. On 14 June 1985, the plaintiff sent a formal letter to the defendant to confirm the terms and conditions of this transaction. In terms, the letter is similar to the letter sent for the 6m GUH shares. The defendant responded the same day by courier. It is in similar terms to the defendant's letter accepting the GUH shares (dated 24 June 1985) except that once again, the date of payment was changed to 12 December and the KLSE terms were made to apply so long as they were not inconsistent with the contract and its terms.

This is what all this boils down to. On 17 May 1985, the defendant claimed to have bought from the plaintiff 6m GUH shares which it sold the same day to Orange Grove, delivery to be made on 11 November 1985. The plaintiff's records show that their agreement to sell the GUH shares was only documented on 20 May 1985, and the legal contract was finally confirmed by letter only on 24 June 1985. Likewise, the defendant claimed to have agreed to buy the GIH shares from the plaintiff on 10 June 1985 and sold them the same day to Orange Grove and Eastronics. But the plaintiff's documents show that they only recorded the defendant's order for the GIH shares on 11 June 1985 and final confirmation took placed by letter on 14 June 1985. The crucial point here is that on these days no money changed hands between the parties, and the plaintiff did not have the shares in hand. The plaintiff had to procure the shares and collect payment from the defendant the day after delivery, in November for the GUH shares, and December for the GIH shares.

Before the delivery dates, the plaintiff procured the required GUH shares and GIH shares through licensed dealers who were also members of the Singapore Stock Exchange ('the SSE') and paid for them. It had to rely upon the defendant to pay for the same.

On 21 November 1985, the plaintiff telexed the defendant about these transactions demanding Phillip Fung to give immediate instructions regarding settlement for the GUH shares due that day and also his instructions for the GIH shares due to be settled on 11 December 1985.

The defendant did not respond to the telex. On 22 November 1985, the plaintiff's officer, Mr Peter Randall, accompanied by its bank manager and Mr Viswanathan (their solicitor of Kean Chye & Sivalingam) attended the defendant's office and saw Phillip Fung. Mr Randall attempted to hand over the 6m GUH shares together with the relevant certificates and executed memoranda of transfers. Mr Phillip Fung declined to accept. The only reason given was that the defendant was unable to pay.

The plaintiff's response was to require Mr Viswanathan to take out a statutory declaration setting out these facts. This must have been done preparatory to taking remedial action. Anticipating this, the defendant recruited the assistance of Michael Huang and applied for accommodation by making overtures towards payment.

On 23 November 1985, Mandy Fung and another director of the defendant (Lee Chua Heng?) sent a letter to Malayan United Bank Bhd in Kuala Lumpur requesting a cashier's order for RM1.5m in favour of the plaintiff to be handed over to Michael Huang on 26 November 1985. The defendant's managing director, Syed signed another letter dated 23 November 1985 addressed to the plaintiff enclosing a cashier's order for RM500,000. The same day, 23 November 1985, Mandy Fung (and Lee Chua Heng) wrote to their aforesaid banker to provide a cashier's order for RM500,000 in favour of the plaintiff to be handed to Michael Huang on 28 November 1985.

The defendant did not give evidence as to how these cashier's orders were carried to the plaintiff. The plaintiff gave credit to the defendant for S$1,291,433.49 on 27 November 1985 and S$344,080 on 29 November 1985 (both through Malayan United Bank Bhd) and a further payment of S$86,102.95 through the Algemene Bank. The plaintiff also sent a telex on 29 November 1985 to the defendant confirming the credit given and requiring settlement latest by 3 December 1985 (2AR 155).

The failure of Pan-Electric to meet its commitments caused the collapse of the stock market which publicly manifested itself by the closure of the Stock Exchanges both of Singapore and Kuala Lumpur in the opening days of December 1985. Notices were issued by the KLSE on 2 and 3 December (not produced) followed by a further notice on 5 December 1985 as follows:

> THE KUALA LUMPUR STOCK EXCHANGE
> MEMBERS' CIRCULAR NO 3426 OF 1985
>
> *Resumption of trading of all counters on*
> *The Kuala Lumpur Stock Exchange*
>
> Further to the notices dated 2 and 3 December 1985, members are hereby advised that the committee members have resolved on the following:
>
> 1 Trading on all counters will be resumed with effect from 10am, Thursday, 5 December 1985.

2 Trading on all counters will only be on an 'IMMEDIATE DELIVERY BASIS' until further notice. Delivery must be made 3pm: A

(a) on the first market day following the day of contract in respect of clients to brokers;

(b) on the second market day following the day of contract in respect of broker to SCANS, failing which buying-in will be effected; B

(c) on the third market day following the day of contract in respect of SCANS to brokers.

3 Trading on all counters on Delayed-one-Month (DIM) basis will be suspended until further notice.

4 Delivery to SCANS in respect of all contracts entered into prior to 2 December 1985 will resume as normal. C

5 No contra deals are allowed.

6 No off-market transactions are allowed.

7 Forward contracts are strictly prohibited.

By Order of the Committee of D
THE KUALA LUMPUR STOCK EXCHANGE
General Manager

Date: 5 December 1985

The SSE also issued a notice on 4 December 1985. It reads as follows: E

STOCK EXCHANGE OF SINGAPORE LTD
MEMBERS' CIRCULAR NO 2479 OF 1985

Members are hereby advised that trading will resume at 10am on Thursday, 5 December 1985 on an immediate delivery basis. The following are to be strictly adhered to: F

1 Selling clients must deliver their scrips on the market day following the date of transaction.

2 Selling brokers must deliver to the clearing house on the second market day following the date of transaction, failing which buying-in will be effected. G

3 No contra deals are allowed.

4 No off-market transactions are allowed.

5 Forward contracts are strictly prohibited.

Date: 4 December 1985 General Manager

H

On 10 December 1985, the plaintiff sent the defendant yet another telex about the GIH shares which the plaintiff had ready for delivery on 11 November 1985 and called for settlement. The defendant did not accept delivery and did not pay.

To say the defendant was in deep trouble would be an understatement. I It was quick to obtain legal advice from an eminent solicitor, namely, Mr Sivalingam. Whether through the plaintiff or from independent sources, the KLSE got to know of the defendant's default and called them to account. All the defendant's directors, accompanied by Mr Sivalingam, had a meeting with the Committee of the KLSE on 18 December 1985. The telex from the KLSE on 21 December 1985 reads as follows:

21 December 1985

Private and Confidential

The Directors
YK Fung Securities Sdn Bhd

Dear Sirs

Forward contracts with James Capel (Far East) Ltd

We refer to the meeting the comittee had with you and your legal adviser, Mr Sivalingam, on 18 December 1985 with regard to the forward contracts involving 6m shares of Grand United Holdings Bhd, valued at S$10.615 and 5.88m shares of Growth Industrial Holdings Ltd, valued at S$16.288m with Messrs James Capel (Far East) Ltd maturing on 21 November 1985 and 11 December 1985 respectively.

In accordance with r 8(11) of the rules relating to firms/member companies, the committee has resolved to appoint a manager for the purpose of enabling you to clear all outstanding contracts entered into with non-members and with other member firms/member companies. Also with effect from Monday, 23 December 1985 you will only be allowed to enter into fresh purchase contracts through the Exchange when you are able to square off your daily position.

In accordance with art 58(B) of the Exchange's articles of association, the committee has also appointed an auditor to verify and monitor the above.

You are also hereby notified that your company is not allowed to enter into any married and/or direct deals and forward contracts.

In connection with the above committee's decision, we would draw your attention to r 8(1)(B) of the rules relating to member firms/member companies, which is self-explanatory.

Kindly acknowledge receipt of this letter by signing and returning the duplicate thereof.

Yours faithfully,
The Kuala Lumpur Stock Exchange

By Order of the Committee
General Manager

The KLSE were thus fully aware of the facts now under consideration and implications of the activities of the defendant with the plaintiff. What followed is significant.

Tan Koon Swan now came into the picture. Within seven days, the defendant was able to iron out an agreement with him called a 'novation agreement'. This is a 10-page document. The subject is 6m GUH shares, 5.88m GIH shares ('these shares') and 4.2m shares in Sealion Hotels Ltd. There were three parties to this novation agreement: (i) the defendant described as vendor; (ii) the Pan-Electric Group of Companies (which consisted of 72 companies held and controlled by Pan-Electric ['the Pan-Electric Group'] — all of which were listed in the First Schedule, Orange Grove [Receivers and Managers appointed] and Eastronics being listed as 32 and 72 respectively); and (iii) Tan Koon Swan. The novation agreement recites that the Pan-Electric Group had purchased the aforesaid shares from the defendant, and by way of this supplemental agreement, Tan Koon Swan personally was to take over all the liabilities of the Pan-Electric Group to the defendant in respect of these shares. Inter alia, the defendant gave the following warranties:

> 3 Warranties
>
> (A) The vendor warrants to and for the benefit of the Pan-Electric Group of Companies and TKS that:
>
> (i) it has the power to enter into, exercise its rights and perform and comply with its obligations under this agreement;
>
> (ii) all action, conditions and things required to be taken, fulfilled and done (including the obtaining of any necessary consents) in order: (a) to enable it lawfully to enter into, exercise its rights and perform and comply with its obligations under this agreement; and (b) *to ensure that those obligations are legally binding and enforceable have been taken*, fulfilled and done; ... (Emphasis added.)

Curiously, the novation agreement does not state the defendant's address but cll 8A, B, C and E are not irrelevant. They read as follows:

> 8 Governing law and jurisdiction
>
> (A) This agreement shall be governed by and construed in accordance with the laws of Singapore.
>
> (B) In relation to any legal action or proceedings arising out of or in connection with this agreement ('proceedings'), each party to this agreement hereby irrevocably submits to the jurisdiction of the courts of Singapore and waives any objection to proceedings in any such courts on the grounds of venue or on the grounds that the proceedings have been brought in an inconvenient forum.
>
> (C) That submission shall not affect the right of any other party to take proceedings in any other jurisdiction nor shall the taking of proceedings in any jurisdiction preclude any other party from taking proceedings in any other jurisdiction.
>
> (D) TKS irrevocably appoints Sigma International Ltd (now of 3, Jalan Pesawat, Jurong Town, Singapore), to receive, for him and on his behalf, service of process in any proceedings in Singapore. Such service shall be deemed completed on delivery to the process agent (whether or not it is forwarded to and received by TKS). If for any reason the process agent ceases to be able to act as such, TKS irrevocably agrees to appoint a substitute process agent acceptable to the other parties within 14 days. Nothing shall affect the right to serve process in any other manner permitted by law.
>
> (E) TKS irrevocably and generally consents in respect of any proceedings anywhere to the giving of any relief or the issue of any process in connection with those proceedings including, without limitation, the making, enforcement or execution against any assets whatsoever (irrespective of their use or intended use) of any order or judgment which may be made or given in those proceedings, and agrees that any final order or judgment shall be conclusive.

Chan Sek Keong — then an advocate and solicitor in Singapore — acted for the defendant and witnessed the signature of the parties. On

30 December 1985, the defendant sent a telex to Chan Sek Keong giving details of the contract numbers of the shares in question. This puts beyond doubt that these shares are the same shares involved in this case and documented in the defendant's records as having been obtained from James Capel. (We are not directly concerned with the Sealion shares in this case).

Since no money changed hands, the effect of this transaction was to clear the liability for S$31,884,100 (ie inclusive of S$4,980,186 for 2.1m Sealion shares) from the Pan-Electric Group's books and likewise, a substitution in the defendant's books of Tan Koon Swan as their creditor instead of Pan-Electric. Why Tan Koon Swan was so cooperative has not been explained. This transaction is powerful evidence of his proximity to the defendant. Clause 8E literally means that Tan Koon Swan would submit to any judgment the defendant wishes to obtain against him.

The plaintiff was not a party to the novation agreement. It could only look to the defendant to recover the money it had spent.

The pleadings

The plaintiff's cause of action was breach of contract. The relief claimed was S$24,711,285.56 or such liquidated sum due at the date of judgment, damages for breach of contract, interest, costs and 'further or other relief'. It was specifically averred that:

> The plaintiffs will give credit for any money arising from the re-sale by them of all or any of the Grand United Holdings shares and/or the GIH shares between the date herein and the date of judgment.

A defence and counterclaim was filed on 18 June 1986. Kean Chye & Sivalingam went on record as the defendant's solicitors. Through Mr Sivalingam, they must have been fully aware of the whole history of the matter. The defence admitted entering into the GUH and GIH contracts but pleaded (contrary to its warranties in the novation agreement) they were unlawful and/or unenforceable. The defendant specifically pleaded in para 8 as follows:

> 8 The plaintiff was at all material times a licensed dealer by virtue of a dealer's licence issued on 31 October 1985 to them under s 14 of the Securities Industry Act 1973 of Singapore ('the Singapore Act') subject to, inter alia, the following condition:
>
> (3) That the licensee shall deal only in securities not quoted on the Stock Exchange of Singapore Ltd and in the case of securities including foreign securities quoted on the Stock Exchange of Singapore Ltd to deal in them only through licensed dealers who are members of the Stock Exchange of Singapore Ltd ('the condition').

The date is significant since it comes after the contracts were made.

The reasons the defendant pleaded as to unlawfulness and unenforceability were as follows:

(i) that the contracts were forward contracts which contravened the Securities Industry Act;

(ii) that they were subject of funding arrangements known to the plaintiff who were therefore doing moneylending business without a licence; A

(iii) that the plaintiff had directly entered into the contracts with the defendant instead of dealing through licensed dealers who were also members of the SSE;

(iv) the Foreign Investment Committee (FIC) approval had not been obtained; B

(v) that because the transactions were off-board private transactions, they contravened the laws which prohibit rigging;

(vi) that the plaintiff knew that the transactions were artificial in that the same group of people were the initial sellers and the ultimate buyers; and C

(vii) that the defendant, to the knowledge of the plaintiff, had not contracted as principal but as the agent of Tan Koon Swan, who had signed the novation agreement and assumed responsibility.

The counterclaim was for the part payment made 'being money paid to the plaintiff under a mistake of fact as stated in para 4 hereof'. No particulars whatsoever were pleaded as to what the mistake of fact was. D

Evidently, the defendant immediately made Tan Koon Swan a third party. The appeal record only shows that at the trial neither Tan Koon Swan nor his counsel turned up and the defendant elected not to call him as witness. Even though by warranty E in the novation agreement the defendant could compel Tan Koon Swan to provide any relief the defendant required, it seems that the defendant sought no relief against him in these proceedings. No reason for this appears in the appeal record. E

The initial reply and defence to the counterclaim was filed on 4 July 1986. The averment in the defence that at all material times the plaintiff was a licensed dealer by virtue of the renewal on 31 October 1985 became a closed issue by virtue of para 6 of the reply which reads: F

> 6 It is admitted that at all material times, the plaintiffs held a dealer's licence under s 14 of the Securities Industry Act 1973 of Singapore in the terms quoted in para 3 of the defence. G

The other defences were all challenged. The proper law of the contract was not put in issue at this stage.

(Tan Koon Swan was convicted by the Singapore High Court on 26 August 1986 and sentenced to two years' imprisonment — see *PP v Tan Koon Swan* [1987] 1 MLJ 18. We will revert to the relevance, if any, of this report at the appropriate juncture later). H

We must infer from the documents put in evidence after the close of pleadings that the normal processes of discovery must have followed. The plaintiff's solicitors attacked the defence resulting in an order of court dated 20 July 1988 directing the defendant to file an amended defence omitting reference to the alleged defence under the Moneylenders Act 1951 which had been struck out. I

It is not clear when this first amended defence was filed. Obviously, it came long after the order made on 20 July 1988, although the Rules of

A the High Court 1980 ('the RHC') required filing within 14 days. The plaintiff got an order to file an amended reply and defence to the counterclaim on 8 December 1989 and did so the same day.

This was the state of the pleadings when the action came on for hearing on 24 July 1990. To the defences now taken which we have B summarized earlier on in this judgment, the plaintiff joined issue by elaborating upon its reply, inter alia, in the following respects:

(i) that the plaintiff had in fact purchased the GUH and the GIH shares through licensed dealers who were members of the SSE;

C (ii) that by a letter dated 4 November 1986, the MAS (which was the regulatory authority) had given its interpretation of the requirements of the plaintiff's licence and thereby it had been clarified that the manner in which the plaintiff had dealt with the defendant and procured the GUH and GIH shares had not contravened the plaintiff's licence; and

D (iii) that the proper law of the contracts was the law of Malaysia.

By this stage, the defendant had changed its solicitors and Chan & Associates now came on record. Mr Sivalingam continued to participate as additional counsel for the defendant. The parties put in an agreed statement of facts. E The comments which we shall hereafter be making about the manner in which the defence was conducted oblige us to set out these agreed facts in full:

Agreed statement of facts

1 The plaintiffs are a company incorporated in Hong Kong and at all F material times have carried on the business of dealing in securities in Singapore at 20 Collyer Quay, 11-01, Tung Centre, Singapore 0104.

2 The plaintiffs were at all material times a licensed dealer by virtue of a dealer's licence issued to them under s 14 of the Securities Industry Act 1973 of Singapore subject to, inter alia, the following condition:

> G '(3) That the licensee shall deal only in securities not quoted on the Stock Exchange of Singapore Ltd and in the case of securities, including foreign securities, quoted on the Stock Exchange of Singapore Ltd to deal in them only through licensed dealers who are members of the Stock Exchange of Singapore Ltd.'

3 Pursuant to the terms of the Singapore Securities Industry Act 1973, and the Monetary Authority of Singapore Act 1984 (as amended by the H Monetary Authority of Singapore (Amendment) Act 1984), the Monetary Authority of Singapore ('the MAS') may grant or renew a dealer's licence subject to such conditions or restrictions as it thinks fit.

4 The defendants are a company incorporated in Malaysia under the Companies Act 1965 and have at all material times carried on the I business of dealing in securities in Malaysia at 64, Clarke Street, Ipoh, Perak.

The GUH contract

5 On or about 20 May 1985, the plaintiffs and the defendants entered into a contract (hereinafter 'the GUH contract') whereby the defendant agreed to accept delivery of 6m shares in Grand United Holdings Bhd ('the GUH shares') on 21 November 1985.

6 In consideration of the plaintiffs agreeing to deliver the GUH shares to the defendants on 21 November 1985, the defendants agreed to pay to the plaintiffs S$10,440,000.

7 The defendants did not accept delivery of the GUH shares and have not paid to the plaintiffs the sum or any part thereof in respect of the GUH contract, save the payments described in para 11 below.

The GIH contract

8 On or about 11 June 1985, the plaintiffs and the defendants entered into a contract ('the GIH contract') whereby the plaintiffs agreed to deliver to the defendants and the defendants agreed to accept 5.88m shares in Growth Industrial Holdings Ltd ('the GIH shares') on 11 December 1985.

9 In consideration of the plaintiff's agreeing to deliver the GIH shares to the defendants on 11 December 1985, the defendants agreed to pay to the plaintiffs S$15,993,600.

10 The defendants did not accept delivery of the GIH shares and have not paid to the plaintiffs the sum, or any part thereof, in respect of the GIH contract.

11 The sum of S$26,433,600 was to be paid to the plaintiffs under the terms of the GUH contract and the GIH contract as follows:

(i) pursuant to the GUH contract	S$10,440,000
(ii) pursuant to the GIH contract	S$15,993,600
Total	S$26,433,600

12 The defendants have made payments to the plaintiffs of S$1,721,616.44 in respect of the GUH contract. The said payments were effected by a direct credit to the plaintiffs' account with Barclays Bank plc, Singapore branch as follows:

Date of Payment	Amount
27 November 1985	S$1,291,433.49
29 November 1985	S$ 430,182.95
Total	S$1,721,616.44

13 Neither the GUH contract nor the GIH contract was reported to the Stock Exchange of Singapore Ltd. At all material times, GUH and GIH shares were quoted on the Stock Exchange of Singapore Ltd and GUH shares were quoted on the Kuala Lumpur Stock Exchange. GUH is and was at all material times a company registered in Malaysia. GIH is and was at all material times a company registered in Singapore.

—Sgd—
M/s Adnan Sundra & Low
Solicitors for the plaintiffs

—Sgd—
M/s Chan & Associates
Solicitors for the defendants

The trial then proceeded on 24 and 25 July 1990. PW1 En Izlan bin Izhab ('Izlan'), the company secretary of the KLSE, gave evidence and tendered his report. His cross-examination was postponed at Mr Chan's request.

PW2 Guarnori then completed his evidence. The next day, 26 July 1990, was wholly taken up with Chan's cross-examination of Guarnori. In the midst of this, the defendant applied to amend its defence. The application was adjourned to another date. PW2 Guarnori who had come from Dubai was excused from further attendance. The case was then adjourned to 16–18 January 1991.

The amended defence and counterclaim was allowed on 6 December 1990 and filed the same day. Contrary to the admissions in the first defence — and indeed the statement of agreed facts — the defendant pleaded, inter alia, the following additional defences:

(i) that it had not entered into any contract with the plaintiff;

(ii) that at the material time the plaintiff was not licensed;

(iii) that the contracts were contrary to public policy;

(iv) that contrary to law the plaintiff had not issued contract notes forthwith;

(v) that the circulars issued by the SSE and KLSE in December prohibiting forward contracts had frustrated the GIH contracts; and

(vi) that the proper law of the contracts was the law of Singapore.

To this, the plaintiff filed a re-amended reply and defence to the counterclaim and the trial entered its third day on 16 January 1991, and carried on the next day and the day after that. Izlan was cross-examined, PW3 Lim Chor Pee (the plaintiff's expert on Singapore law) was partially cross-examined by Mr Sivalingam and the case was adjourned to 28–30 October 1991.

During this adjournment, the defendant applied to amend its defence yet again. The judge refused to allow it. The trial then proceeded into its sixth day on 28 October 1991 and the plaintiff closed its case.

Contrary to usual practice, the defendant's officer was not the first to give evidence. (Unless good reasons are given, we think this practice should not be permitted in future, and the courts should insist that the parties involved give their evidence first). The defence called DW1 Tan Kok Liang, the erstwhile financial controller of the Pan-Electric Group. He occupied 28–30 October 1991. Seven days were fixed in October 1992 for continuation.

The defendant's solicitors then applied yet again to amend the defence and counterclaim (its fourth application). It was heard and dismissed on 27 August 1992 (see [1993] 1 CLJ 416). The purpose of the application was to plead s 34 of the Singapore Act to permit the defendant to contend that it was entitled to rescind the contracts by a notice of rescission dated 7 June 1991 (ie six years later). The case was due to continue from 1–17 October 1992.

The defendant appealed against this dismissal to the Supreme Court. The result of this manoeuvre was that the October 1992 hearing had to be vacated. The Supreme Court dismissed the appeal on 10 August 1993. The trial then resumed on 30 September 1994 (its ninth day) and continued intermittently for another seven days on 1 October, 27 and 31 December

1994 and thereafter again on 25 and 26 May 1995. Apart from Tan Kok Liang, the defence called two experts, DW2 Walter Woon and DW3 Paul Latimer. DW4 Phillip Fung was the last witness to give evidence for the defence. Izlan was also called for further cross-examination. Although Fung Yan Khai, Syed, Mandy Fung, Michael Huang and Tan Koon Swan himself had all been directly involved, none of them was called to give evidence for the defendant, nor was any explanation offered for their absence.

The evidence relating to mitigation

As earlier set out, Guarnori had given evidence that after the Pan-Electric crash, the GUH and GIH shares were worthless. From the tenor of its pleadings, it was manifestly obvious that the defendant was not interested in them either. Some two years and three months after the plaintiff had closed its case, and the defendant had already commenced to give its evidence, an advertisement appeared in *The Star* that the board of GUH Bhd was going to restructure by a capital reduction and consolidation. It therefore invited shareholders to return old certificates for new ones. The defendant's solicitors then wrote to the plaintiff's solicitors on 1 March 1994 as follows:

> We refer to our letter of 8 February 1994 on the above matter and note that you have yet to respond accordingly.
>
> As we have not heard from you to the contrary, we hereby assume that your client is still in possession of the 6m GUH shares as stated in para 4 of the statement of claim.
>
> In respect of the restructuring scheme of GUH Bhd as announced in *The Star* of 4 February 1994, kindly immediately confirm whether your client has returned all the 6m GUH share certificates to the registrar.
>
> We would also appreciate your immediate confirmation as to whether your client is subscribing to the RIGHTS ISSUE as advertised in the same issue of *The Star* referred to above as the deadline of 5pm 17 March 1994 is fast approaching.
>
> In the event that your client has declined to subscribe to the RIGHTS ISSUE, then without prejudice to our client's contention that they are not liable for the said shares, our client would be obliged if your client would promptly renounce the RIGHTS ISSUE in favour of our client.
>
> Your prompt response to the above will be greatly appreciated.

How the defendant's solicitors could reconcile this overture with their purported rescission of 7 June 1991 was not explained.

The plaintiff's solicitors replied 'without prejudice' on 2 March 1994 that without prejudice to their claim against the defendant, the plaintiff had returned the 6m old GUH shares to GUH Bhd and were awaiting the new shares which would amount to 750,000 new GUH shares. As regards the rights issue, their letter continued:

> With regard to the announcement which appeared in *The Star* on 4 February 1994 concerning the proposed rights issue by GUH, we also confirm that our client has received a provisional allotment letter indicating that 750,000 new GUH shares arising under the rights issue have been provisionally allotted to it.

A > A request for splitting the allotment was duly filed with the registrar by 17 February 1994, the latest date for splitting. Our client has yet to receive split provisional allotment letters corresponding to its request for splitting.
>
> Without prejudice to its claims in the above proceedings, our client intends to subscribe for as many of the GUH shares provisionally allotted to it as is possible without it having to advance further monies to fund the B purchase. Instead, our client intends to fund the purchase from the proceeds arising out of the sale of a sufficient number of GUH shares such as will enable it to achieve this purpose. The GUH shares to be sold by our client will, depending on the price, either be those which have been provisionally allotted to it under the rights issue, or those which our client is entitled to under the capital reduction.
>
> C In view of the request set out in para 6 of your letter, if your clients are interested in purchasing those GUH shares which our client is willing to sell as described above, they should contact Mr Paul Thong of Thong KHJC, Penang (Tel No (04) 628868; Fax No (04) 635741/622852) by 2.30pm on Thursday, 3 March 1994. Please note that discussion with Mr Thong regarding the terms of any such sale are to be on a without prejudice basis.
>
> D In the event that your clients fail to contact Mr Thong by the deadline specified above, or satisfactory terms for the sale cannot be agreed upon, those of the GUH shares which our client intends to sell will be sold to third parties in the market.

The defendant did not contact the plaintiff as requested or at all. So on E 16 March 1994, the plaintiff's solicitors wrote to the defendant's solicitors as follows:

> We refer to our letter of 2 March 1994.
>
> As your clients did not contact Mr Thong by the deadline specified in that letter, on 3 and 4 March 1994, our client sold in the market 125,000 F of the GUH shares to which it was entitled under the capital reduction. The average price obtained was RM6.0336 per share. The proceeds from this sale which, less clearing fees and brokerage, total RM750,047, have been utilised by our client to subscribe for the 750,000 GUH shares provisionally allotted to it under the rights issue.
>
> G Our client is continuing to monitor the price of the remaining GUH shares which it currently holds, namely 625,000. Our client will also monitor the share price of the GUH shares arising under the rights issue once these have been listed.
>
> In respect of both the GUH shares which it currently holds and those which it will hold following the rights issue, our client reserves the right to H sell, without prior notification to your clients, some or all of these shares whenever it considers it appropriate to do so. For the avoidance of doubt, any such sale or sales made by our client will be without prejudice to its claims in the above proceedings.
>
> Notwithstanding the above, and although there is no obligation on our client to do so, your clients are nevertheless invited to contact this firm I immediately if, at any point, they consider that some or all of the GUH shares held or to be held by our client should be sold. The individual your clients should contact is Mr N Chandran. Your clients are also invited to contact this firm if, at any point, they are interested in buying some or all of the GUH shares held or to be held by our client.
>
> In the event your clients contact this firm in the circumstances described above, serious consideration will be given by our client to your clients' views

> or request, as the case may be. There will, however, be no obligation on our client to act on your clients' views or accede to their request. A
>
> In relation to the above proceedings, our client will give credit for any monies arising from the sale or sales of some or all of the GUH shares held and to be held by it.

At that time, the defendant's solicitors elected not to bring these matters B to the trial judge's notice at all. Between 3 March 1994 and 14 September 1994, the plaintiff sold 1.3m of the GUH shares and realized RM5,679,645 after reduction of the rights issue costs, stamp duty and related expenses (see Appendix 1 to the plaintiff's closing submission). The defence's position as to this in its final reply was that the plaintiff should not be permitted to put this information before the court because the plaintiff did C not call formal evidence to prove the sale of these shares (see the defendant's counsel's final written reply paras 1.7, 1.8 and 1.9). This submission overlooked the fact that the plaintiff had closed its case on 28 October 1991. In any event, the line taken by the defendant was that because the defendant had a right to rescind — which they would in any event have D exercised — the plaintiff was entitled to nominal damages only, and relied on the decision of *The Mihalis Angelos* [1970] 3 All ER 125. We will revert to this later.

The issues raised by the defendant at the trial

E

It is axiomatic that when an action is filed in a Malaysian court — as was done in this case — the Malaysian court will decide the case according to Malaysian law unless it was successfully contended by one of the parties that the law of some other country should apply. Taken together, the statement of claim and the statement of agreed facts between them had already established that the contracts had been made for the consideration F stated and that when the time came for performance the defendant repudiated the contracts by refusing to take delivery and pay the amount remaining due. The unchallenged evidence was that whereas the plaintiff had bought the shares for the values stated before the delivery dates, the shares became worthless from December 1985 onwards until after the G plaintiff closed its case five years later.

It was the defendant's assertion that, notwithstanding these basic facts, it was not liable to pay on a number of grounds. The onus of establishing these grounds thus fell squarely upon the defence. Not all the grounds pleaded were urged by the defendant at the close of the defence. H The following extract from the judgment of the court below is relevant (see [1996] 2 MLJ 97 at p 113):

> At the conclusion of the evidence and before final submissions were made by learned counsel, I believe I had informed them to the effect that any point of law or fact should be covered by the oral submission to be made, I otherwise the court would not have regard to any point not so covered nor would it consider itself bound to offer any of its opinion on it. In this light, I would deal with the oral submission of learned counsel for the Ipoh brokers. This was to avoid having to deal with, without any clear legal submission, all those hurdles and sundry points which the Ipoh brokers poured into their pleadings from the beginning.

Suffice it therefore to set out only the following issues which the defence raised in their final submission:

(i) that the proper law of the contracts was the law of Singapore;

(ii) (a) that the plaintiff had breached condition No 3 of its licence by failing to direct the defendant to a Singapore dealer who was a member of the SSE and thus ensure that the defendant bought the shares direct from such a dealer and not from the plaintiff who was not a member of the SSE;

(b) that at the time of entering into the contracts, the plaintiff did not have a valid licence;

(iii) that by failing to disclose that plaintiff was acting as principal, the defendant had acquired a right under s 34 of the Singapore Act to rescind the contract, and did so rescind (the defendant was refused leave to amend their defence to plead this but nevertheless proceeded to lead evidence on this and argue it);

(iv) that the contracts were forward contracts which were illegal as they were prohibited by the Rules of the Stock Exchange, common law and public policy;

(v) that the contracts were illegal and unenforceable as the plaintiff had not issued 'contract notes' forthwith as required by Singapore law;

(vi) that the plaintiff was not entitled to claim for the price of the shares but only for damages. As to this, the plaintiff had not proved their damage because it had failed to give evidence on the number of GUH shares it had sold; and

(vii) that the plaintiff had participated in an illegal funding scheme in order to permit the Pan-Electric Group to roll over the GUH and GIH shares. This submission included allegations of manipulation, and rigging the market. In the defence counsel's own words, '... the funds of the Pan-El Group were misapplied as a result of a conspiracy between the Pan-El directors and the plaintiff'.

The judgment of the trial judge

The trial judge stated that it had been pleaded in the statement of claim that the contracts were intiated by a phone call made on or about 20 May 1985 by Phillip Fung to Lau Wai Kwok ('Lau'). We agree with the defendant's counsel that the statement of claim said no such thing. For reasons which will shortly follow, we cannot agree that this error occasioned any injustice to the defendant. The trial judge went on to deal with the pleadings, the documents which passed between the parties and the evidence and found (despite the defendant's contentions to the contrary) that the contracts had been concluded. He then proceeded to give his reasons why the proper law of the contracts was the law of Malaysia and not the law of Singapore. Having so found, he held that the defence's submissions of the alleged illegality of the two contracts would be ignored because the essential validity of these contracts had to be determined under Malaysian law. He thus declined to consider the evidence of the experts on the intricacies of Singapore law. Under Malaysian law, the trial judge found that forward contracts were not illegal and rejected the allegations of manipulation and illegal funding. A

The other aspects of this judgment which are significant are the trial judge's adverse comments on the credibility of Phillip Fung and the failure of the defendant to call Tan Koon Swan. He also held that the defendant's counsel's acts in running the defence under s 34 of the Singapore Act was an abuse of process. B

The relief given was based on breach of contract. The order reads as follows (see [1996] 2 MLJ 97 at pp 116–117):

> I therefore give judgment as follows:
>
> (1) that the defendants do pay the plaintiffs, within one month from today the sum of S$24,611,983.56 with interest at 8% per annum from today till satisfaction; C
>
> (2) that the plaintiffs, on receiving the said sum of S$24,711,983.56 do deliver, within one further month thereafter, all valid and registrable transfers of all shares together with all the relevant share certificates in Grand United Holdings Bhd and Growth Industrial Holdings Ltd respectively, inclusive of all other shares accrued from any entitlement to any bonus issues, rights issues or all other issues flowing naturally from the original shares comprised in the two original contracts of shares in question; D
>
> (3) that the plaintiffs, on receiving the said sum of S$24,711,983.56 do, within one month thereafter, pay without any interest any proceeds of sale actually realized from the sale of any of the aforesaid shares in mitigation of their loss; E
>
> (4) that in the event of any dispute relating to the delivery of such transfer of such shares or such proceeds of sale as stated above, such dispute is to be resolved by a Senior Deputy Registrar of the High Court at Ipoh in an enquiry to be conducted as soon as possible viva voce and with any appeal therefrom to the judge in chambers under O 56 of the Rules of the High Court 1980; F
>
> (5) that the counterclaim of the defendants be dismissed;
>
> (6) that no order of whatever nature is made in respect of the third party herein; and G
>
> (7) that the defendants do pay all costs to be taxed.

Mr C Abraham of counsel for the defendant advanced six grounds of appeal, which we summarize as follows:

(i) that the proper law of the contracts was Singapore law; H

(ii) that under Singapore law, the contracts were illegal and unenforceable;

(iii) that even if Malaysian laws was the proper law, the contracts were still illegal and unenforceable;

(iv) that the trial judge had not dealt with Tan Kok Liang's evidence at all; I

(v) that at the time the contracts were made, the plaintiff was not a licensed dealer; and

(vi) that incorrect principles had been applied in assessing the true measure of damages payable to the plaintiff without proper regard for the provisions of the Sale of Goods Act 1957.

The entire factual matrix of the evidence given in the court below was once again canvassed in support of these contentions, and an in-depth analysis is now required.

The disputed facts — Was the plaintiff a licensed dealer when these contracts were concluded?

When PW2 Guarnori completed giving his evidence on 25 July 1990, it will be recollected that the position taken by the defendant in its defence dated 18 June 1986 was that by virtue of the dealer's licence issued on 31 October 1985, the plaintiff was at all material times a licensed dealer. The significance of this date was that the contracts were made in May and June 1985. In the plaintiff's reply dated 4 July 1986, this averment was admitted. To reinforce the position, the statement of agreed facts reiterated that at all material times the plaintiff was a licensed dealer. It was on this basis that PW2 Guarnori gave his evidence. He was the only representative of James Capel who gave evidence for the plaintiff and he was the managing director of the plaintiff in 1985. At no time in his cross-examination did the defendant's counsel even suggest that the plaintiff was unlicensed.

This suggestion was first made in the defendant's amended defence filed on 6 December 1990 by way of the amended para 8 of the defence. The statement of agreed facts remained on record.

After this amended defence and counterclaim was filed, the plaintiff's expert witness PW3 Lim Chor Pee gave evidence that the plaintiff continued to be a licensed dealer at all material times by virtue of s 20(2) of the Singapore Act. He gave evidence on 16 January 1991 and his report was put in as exh P17. He also gave oral evidence-in-chief on the validity of the licence during the relevant contractual dealings. At no point in time was he challenged on this point in cross-examination by either Mr Chan or even by Mr Sivalingam up to 18 January 1991. The matter was adjourned to 28 October 1991. The defence still did not challenge the statement but terminated its cross-examination that day.

Yet when the plaintiff's counsel sought to put in the application for the renewal of the licence at the conclusion of Mr Lim Chor Pee's evidence, the defence sought to block it. Having already admitted that the plaintiff was licensed, the only reason we can assign to such obstructive tactics is the desperation of the defendant to make life as difficult as they could for all concerned.

Despite all evidence to the contrary and the agreed facts that the plaintiff was a licensed dealer at all material times, to our astonishment the defendant's solicitors instructed their counsel to argue this point again before us on appeal. When we told Mr Abraham that it was a most unattractive point to argue, he did not pursue it further.

For the record, however, we must state here that it is the opinion of this court that once a party to litigation has admitted a fact in his pleadings he shall not be heard to contend the contrary in the trial or in any appeal therefrom. We hold that ground 2 (iii)(e) is an impermissible ground of appeal in the circumstances.

In view of the state of the pleadings up to 8 December 1990 and the unchallenged evidence of PW2 Guarnori and PW3 Lim Chor Pee on the point, we also must state that we deprecate the manner in which this wholly unmeritorious point was pursued.

What led to the making of these contracts?

In order to sustain their submission that the proper law of the contracts was Singapore law, much of the defendant's submission was directed to show that the acceptance element of those contracts took place in Singapore and the contracts were therefore made in Singapore.

The learned trial judge said that according to the statement of claim, they were made as a result of a telephone call by Phillip Fung to Lau on or about 20 May 1985. This was an error because there was no reference whatsoever to any telephone call in the statement of claim.

What turns on this is the principle stated in *Entores LD v Miles Far East Corp* [1955] 2 QB 327, which held that a contract made by telephone is deemed to be made at the place where the offeror hears from the offeree that his offer has been accepted.

PW2 Guarnori gave evidence for the plaintiff in his capacity as managing director. No part of his cross-examination was specifically directed towards establishing who first spoke to whom by way of making the offer and by way of indicating acceptance of these two contracts. The plaintiff's case depended on the contemporaneous documents put in and the inferences to be drawn from them.

It was Phillip Fung ('PF') who gave oral evidence of the alleged background of events leading to these contracts. None of PF's allegations as to all this was put to PW2 Guarnori and consequently, the plaintiff had no opportunity to comment upon them. In summary, this is what PF said.

He met Tan Koon Swan ('TKS') in August 1984. TKS introduced him to Tan See Cheng ('TSC') (since deceased) and Michael Huang ('MH') in November 1984, and said these two men would be co-ordinating his transactions. In February 1985, these two men asked PF to meet TKS to go through contracts worth RM40–50m. PF said he did not have that kind of money. MH told PF funding would be arranged and all he had to do was to put the contracts through and delivery would be six months later. TKS said a private limited company would be the buyer from the defendant and TKS would back the deal up with a corporate guarantee. In March 1985, PF said he was asked by MH and TSC to go down to Singapore to meet TKS. He did so and met Tan Kok Liang who confirmed that Pan-Electric or GIH would issue the corporate guarantee if the shares were passed through TKS. In May, PF said Tan Kok Liang told him that Lau of the plaintiff would contact him to confirm delivery and settlement instructions. PF then referred to a telephone conversation in May 1985 between Lau and himself in which it was agreed that the GUH shares would be put through the defendant and the plaintiff would be the broker. He then said he had heard the name of the plaintiff before, and that after the agreement with Lau, he issued the contract notes for the sales of the GUH shares for Orange Grove for whom he was buying the shares. He thought the plaintiff was an English broker from London. Later, in cross-examination, he said he knew Lau was calling from Singapore and he therefore assumed the plaintiff was based in Singapore. But he put the London address because he found this in an international directory. He confirmed that the letters 'AIS' on the defendant's notes meant 'arrival including stamp'.

The defence opened its case on 28 October 1991. PF elected to be called to give evidence over three years later on 28 December 1994. The failure of the defendant's solicitors to call MH or TKS not only raised an adverse presumption against the defendant under s 114(g) of the Evidence Act 1950, but it also excluded consideration of the purported truth of statements attributed to MH or TKS. The adverse presumption under s 114(g) of the Evidence Act 1950 must also apply to the defendant's failure to call Syed and Mandy Fung who were directly involved in the paperwork relating to these contracts.

PF gave evidence of matters which took place more than nine years ago. Whilst he admitted to preparatory discussions with MH, TSC and TKS himself, he did not say that he ever met Lau. We find it incredible that upon hearing a voice on the telephone out of the blue from a man he had never met, he would accept an offer to buy 6m GUH shares for S$10,440,000 at S$1.74.

The consequence of his evidence and the documents issued by the defendant on 17 May 1985 show the defendant had on that day decided both on quantity and price with Pan-Electric for the GUH shares. Since the defendant did not have the money, it is inconceivable that they would have dealt with the plaintiff unless they had first secured the commitment of funds from the defendant to pay for the shares. Only then would the defendant have asked the plaintiff to buy. The plaintiff's documents prove this, because their bargain confirmation of 20 May 1985 is confirmation of their acceptance by telephone of the defendant's order to buy. The evidence which followed shows the plaintiff then went into the market and bought from third parties. It was not selling GUH shares which it had in stock. The bargain confirmation was sent to Ipoh.

We therefore reject the defendant's submission on this point and hold that the trial judge correctly applied the test in *Entores LD v Miles Far East Corp* in holding that the GUH contract was made in Ipoh. By a parity of reasoning on the facts before us, we also hold the contract for the GIH shares was made in Ipoh.

The other facts relating to the determination of the proper law of the contracts

In addition to the material which the learned trial judge spelt out in coming to his conclusion that the proper law of this contract was Malaysian law (with which we entirely agree), we want to draw close attention to two other features.

When the defendant sent out their last letter confirming the terms A and conditions of the GIH and GUH contracts on 14 June 1985, all the essential terms of those contracts had already been agreed upon and documented. In our view, therefore, the variation of the date for payment one day later and the application of the rules of the KLSE to the extent they were not inconsistent did not affect the validity of both contracts. B Indeed, by then, the plaintiff had part performed its obligations by buying the shares.

The second point which bears emphasis is the first condition of the defendant's dealer's licence, which was mandatory. The words are:

> ... such business shall only be carried on at 65 Clarke Street, Ipoh; and C (2) shall not establish any branch.

This restriction explains why the defendant was so adamant about refusing the plaintiff's attempt to apply the SSE rules and insisting that the KLSE rules alone should apply except where inconsistent.

The inference is thus open that the defendant made an implied D choice of Malaysian law to govern these contracts because the only place where it could legally deal in securities was at their given address in Ipoh. The requirement in their contract notes that the shares should arrive duly stamped in Ipoh and the attempted delivery and actual part payment out of Ipoh all taken together established that these transactions had their closest and most real connection with the system of law in Malaysia. E

On the allegation that the plaintiff was a party to the funding scheme of Tan Koon Swan, rigging and manipulation of the market

This submission got short shrift from the learned trial judge. They were F repeated by the defendant's counsel to us who adopted the purported evidence given by the defendant's experts that such activities had in fact taken place and that the plaintiff was a party thereto.

Phillip Fung, as already pointed out, did not give any evidence to this effect. He did not suggest that the transaction vis-a-vis the plaintiff was in any way artificial. He knew that he was obliged to pay for the shares G bought for the defendant. When asked to pay, he did not suggest that the defendant was under no liability to pay for any reason. Indeed, the defendant — with the full proven documentary involvement of Syed, Mandy Fung and one other director — paid RM2m towards account. Guarnori had given evidence that the plaintiff did not know the identity of the client for H whom the defendant was buying these shares. He said that when he asked Phillip Fung, the latter refused to reveal the identity saying it was confidential. Guarnori was not challenged about this in cross–examination.

It was DW1 Tan Kok Liang who obliquely suggested that the plaintiff was aware of the scheme. Before we analyse his evidence, we must once again state that no part of his allegations on this score was ever put or even I suggested to Guarnori in cross-examination. Had Guarnori been roundly confronted with these allegations and of the plaintiff's responsibility for Lau's alleged actions, the plaintiff would have been obliged to call Lau or prove good reasons why it could not do so. This omission of the defendant alone and by itself made Tan Kok Liang's evidence worthless.

The defence's objective of calling Tan Kok Liang was to establish that the plaintiff had conspired with Tan Koon Swan and his agents to fabricate a false market with artificial transactions in which, to the knowledge of the plaintiff, Tan Koon Swan or Pan-Electric were both the sellers and the ultimate buyers of the GUH and GIH shares, which were the subject matter of this case.

But his testimony was riddled with so many contradictions and pure hearsay that the only safe conclusion one could draw from it was that he had no personal knowledge of any of the accusations he made against the plaintiff but relied entirely on what he was allegedly told by Peter Tham, TKS and MH, none of whom were called. Furthermore, apart from the statement of facts he admitted to in his prosecution which was not admissible evidence in this case, not a single document was produced to back up his testimony.

Some examples of these infirmities can readily be given. He swore he had never met the defendant (presumably Phillip Fung) until months after May/June 1985. Phillip Fung swore he met Tan Kok Liang in Singapore in March 1985 and he identified himself as finance director of Pan-Electric and GIH. In his evidence-in-chief, Tan Kok Liang said the Pan-Electric Group had no dealings with the plaintiff until April/May 1985. Subsequently, he gave evidence of prior dealings between Peter Tham, Asian Associated Securities and Pan-Electric with some stockbrokers — including J Balas and MH — who had dealings with the plaintiff. To establish that J Balas and MH vis-a-vis the plaintiff knew or suspected that all three were agents for Peter Tham or Tan Koon Swan required Balas, Michael Huang and Tan Koon Swan to be called. Indeed, in cross-examination he said:

> At the meeting at Tung Centre they were not surprised ... as they were briefed by Michael Huang. My presence was merely confirmation that Peter Tham and GIH would be the borrowers.

The rest of his testimony must be treated as pure speculation because the evidence shows that everybody — including MH — paid hard money for the shares which are the subject matter of this case.

As to the total failure of the defence to put any of Tan Kok Liang's evidence to Guarnori, we can do no better than repeat what Mukharji J said in *AEG Carapiet v AY Derderian* AIR 1961 Cal 359:

> The law is clear on the subject. Wherever the opponent has declined to avail himself of the opportunity to put his essential and material case in cross-examination, it must follow that he believed that the testimony given could not be disputed at all. It is wrong to think that this is merely a technical rule of evidence. It is a rule of essential justice. It serves to prevent surprise at trial and miscarriage of justice, because it gives notice to the other side of the actual case that is going to be made when the turn of the party on whose behalf the cross-examination is being made comes to give and lead evidence by producing witnesses. It has been stated on high authority of the House of Lords that this much a counsel is bound to do when cross-examining that he must put to each of his opponent's witnesses in turn, so much of his own case as concerns that particular witness or in which that witness had any share. If he asked no question with regard to this, then he must be taken to

> accept the plaintiff's account in its entirety. Such failure leads to miscarriage of justice, first by springing surprise upon the party when he has finished the evidence of his witnesses and when he has no further chance to meet the new case made which was never put and secondly, because such subsequent testimony has no chance of being tested and corroborated.

This passage and the decision of the House of Lords in *Brown v Dunn* (1893) 6 The Reports 67, upon which it was based, were cited with approval in *Chua Beow Huat v PP* [1970] 2 MLJ 29 at p 32.

Furthermore, any allegation of conspiracy must be especially pleaded and full particulars given before any evidence can be led on it. There was no such plea here, and the learned trial judge quite correctly brushed these allegations aside.

More to the point, there was not a shred of evidence to show that the shares procured by the plaintiff to fulfill the GUH and GIH contracts had come directly or indirectly from Tan Koon Swan, Tan Kok Liang or the Pan-Electric Group. On such a serious allegation, the most cogent evidence would have had to be called to establish these charges. The onus of proving conspiracy or fraud even in a civil trial is a very high one, and the guesswork of Tan Kok Liang, a self-confessed criminal, cannot be countenanced.

Indeed, the documentary evidence produced by the plaintiff proved the reverse. The subject matter of the two contracts was bought on the open market at arm's length from the National Australian Bank, Lin Securities and Michael Huang and settled through licensed dealers who were members of the SSE.

We must therefore categorically state no evidence was produced in the court below to substantiate the allegation of Tan Kok Liang that the plaintiff knowingly participated in this scheme of Tan Koon Swan's.

The curious twist to this allegation was that Phillip Fung who was involved up to his eyeballs in Tan Koon Swan's scheme swore that he did not know if the contracts amounted to market rigging, and that the defendant would not enter into any contract amounting to market rigging. It was very strange to hear Phillip Fung contend, if he did not know of market rigging, why the plaintiff should have been in any better position to know about this.

Factual issues on illegality and public policy — the Malaysian position

The body charged at the material time with the responsibility of policing dealers in securities in Malaysia was the KLSE and in Singapore, the SSE and the MAS.

On 18 December 1985, when the defendant's directors and their legal adviser Mr Sivalingam met the Board of the KLSE what was discussed at such length was the defendant's failed obligations on the very same GUH and GIH contracts with the plaintiff, with which this court is now concerned.

The telex sent to KLSE on 21 December 1985, coupled with Phillip Fung's evidence, proves that the KLSE appointed its own manager and also an auditor to take over the defendant's operations to ensure that the defendant's obligations to its clients were rationalized. Phillip Fung said

A these officials continued to oversee the defendant's operations for about six months after their appointment. It is an irresistible inference that the KLSE was totally aware of all aspects of the defendant's activities in relation to these contracts and their involvement with Tan Koon Swan.

PW1 Izlan Izhab was the company secretary of the KLSE when he B gave evidence on 24 July 1990. He held office in the KLSE in 1985. The report he submitted (exh P1) was made on 1 January 1990 with the authority and on behalf of the KLSE. The fact that the KLSE, with full knowledge of all that happened, did not initiate any prosecution or take any legal action against the defendant for the alleged breach of any of its C rules speaks for itself. The fact that it put itself out to allow the novation agreement to be made also speaks for itself about the legality of forward contracts made prior to the issues of its circular dated 5 December 1985. It is an irresistible inference that the KLSE, being the very body entrusted with power to discipline its members, would not have permitted the defendant to reverse Pan-Electric's liabilities to Tan Koon Swan if it D thought that the contracts were in any way illegal or unenforceable.

On 30 December 1994, 4½ years after PW1 Izlan had first given evidence at the trial and three years after the plaintiff closed its case, the defence counsel applied and was permitted to recall Izlan for further cross-examination. It is reasonable to infer that the defence would not have done E this unless it knew what Izlan was going to say. In the absence of any evidence as to what his official position now was, it had to be inferred that he testified in his personal capacity. In a bizarre about-turn, he now gave it as his opinion — contrary to the view he had earlier expressed — that prior to 5 December 1985, 'forward contracts were prohibited because such contract did not appear in the rules of trading except for one-month F delayed contracts. The circular merely restated the position about forward contracts'.

It is evident the trial judge rejected this testimony but the defendant's counsel put it again before us as a reason why we should hold that the contracts were illegal.

G In passing, we wish to observe that in future cases the defence should not be permitted to recall the plaintiff's witnesses for further cross-examination after the plaintiff has closed its case, unless there are very exceptional reasons. The questions put to En Izlan in 1994 were the same put to him in 1990. He gave no reason as to why or how he had been H persuaded to change his mind. The actions taken by the KLSE from December 1985 with special reference to the telex and the novation agreement amply demonstrate that the KLSE treated these contracts as legal and binding. We reject this opinion evidence of alleged illegality as unworthy of credit.

I *Factual issues on illegality and public policy — the Singaporean position*

In the first defence and counterclaim filed on 18 June 1986, the defendant had pleaded that the two contracts were unlawful and unenforceable because the plaintiffs had dealt with the GUH and GIH shares in a manner which was contrary to their dealer's licence.

The plaintiff adduced evidence proving that it had referred all the relevant documentation relating to these two contracts to the MAS to satisfy both the Authority and themselves that the plaintiff had fully complied with the terms and conditions of its dealer's licence and had done nothing illegal. The plaintiff's letter dated 3 September 1985 to the MAS sets out the whole of the documentation produced at the trial. The MAS replied on 4 November 1985. A B

It is not clear from the appeal record whether this letter was admitted in evidence as it was first marked 'P7' and then 'ID7'. But it has been included in the appeal record. We think it was admissible as evidence if not as to the truth of its contents, then at least as evidence that such a letter was sent and these statements therein were made by the MAS. C

Once again, the clear conclusion is that the MAS did not find anything objectionable or illegal about the acts of the plaintiff in carrying out these transactions.

The evidence of the defence 'experts' D

Holding that the proper law of the contracts was Malaysian law, the learned trial judge completely disregarded the evidence of all the experts who gave evidence on Singapore law. Before us, the defendant's counsel adopted wholesale the reports and evidence of Walter Woon and Prof Latimer in support of his submissions. E

It is significant that the defendant's solicitors only sought the assistance of Walter Woon some time after the adjournment on 1 January 1991 to 28 October 1991. Professor Latimer's opinion was obtained on 16 December 1994. This could explain why the defendant's solicitors did not put the contents of these reports to Guarnori or even to Lim Chor Pee in cross-examination. F

As early as 16 January 1991 — just before putting Lim Chor Pee on the stand — the plaintiff's counsel told the court that the defence had been supplied with Lim Chor Pee's report, and the defence should supply the plaintiff with the defence expert's report so that Lim Chor Pee could deal with it. Mr Chan's retort, which is on record, reads: G

> I have not agreed to make available the report. What was agreed was that there should be an expert on one side.

On the assumption that the defence was in possession of Walter Woon's report on or about 23 October 1991 (see exh D8) — which is its date — the defendant did not put it to Lim Chor Pee when the case resumed on 28 October 1991 and the plaintiff closed its case that day. Curiously, the fax number on every page of this reports states it was faxed three years later, presumably to the defendant's solicitors on 24 September 1994. Walter Woon commenced giving evidence on 30 September 1994. H

We are drawing attention to this so that there is no repetition of this kind of problem in future. Order 25 r 8(1)(b) of the Rules of the High Court 1980 ('the RHC') makes it mandatory for the written report of the expert a party wishes to call to be disclosed to the other parties in the action within 10 weeks of the close of the pleadings. Unfortunately, this rule only applies in personal injury actions. As a result, in other kinds of I

A actions, the parties can so arrange the conduct of their action as to evade the need to disclose their expert's report until the last moment (see also O 38 r 6). This is very undesirable. There is an urgent need for the rules of our courts to be amended by adding provisions similar to O 38 rr 35–44 of the Rules of the Supreme Court in England (see The Supreme Court Practice (1997) Vol 1 pp 681–686). In the meantime, in non-personal B injury actions, the parties should ensure that the summons for directions contain specific directives to ensure that all experts' reports are filed and served when the action is entered for trial.

So far as this case is concerned, we want to emphasize — so far as the expert evidence is concerned — that the existence of any relevant Singapore C legislation, and the rules of the SSE (being the law and the rules of a corporate institution of a foreign jurisdiction) and any judicial pronouncement thereon by a Singapore court is an issue of fact upon which evidence may be given. But having so established the existence of such legislation or rules, the effect of their application to the particular D facts of this case is a question of law for this court to decide. Putting it at its highest therefore, the evidence of the experts on how the foreign law or rules are to be interpreted or applied is mere opinion evidence which the court may or may not accept. Experts should stick to the facts. If their integrity is to be respected, they should desist from suggesting escape routes from liability based on evidence which has not been given. Where E the language of the foreign statute or rules and regulations are in pari materia or very similar, it would be safe to assume — in the absence of actual judicial decisions by a Singapore court to the contrary — that the Singapore court would decide the matter in the same way as we would. Malaysian law is within our knowledge and competence and it is the F court's duty to interpret Malaysian law and apply it and not depend on the opinions of witnesses, however learned they may claim to be.

In *Trade Practices Commission v Arnotts Ltd & Ors* (1990) 92 ALR 527 at p 533, Beaumont J said:

> In my opinion, these authorities establish that there is a rule of evidence at G common law that, except in a straightforward, uncomplicated case, where the facts are admitted and readily identified, the opinion of an expert is admissible only where the premises — that is to say, the facts — upon which his or her opinion is based, are expressly stated. It follows that in a complex case where facts are not readily identifiable, it is not permissible to put the whole of the transcript and documentary evidence to the witness *en bloc.*
>
> H *This is complex litigation and the facts in respect of which Dr Williams purported to express his opinion were not admitted by the respondents. Indeed, the facts and the proper inferences or conclusions to be drawn from the facts contended for by the Commission were vigorously disputed by the respondents over the many months of this litigation.* In the circumstances, it is impossible for the court to know what facts Dr Williams had in mind when expressing his views.
>
> I This objection to his evidence is not a mere technicality nor is it only a rule to be applied in jury trials. True, some of the authorities refer to the jury, but the rule is of general application. In complicated litigation, there are sound reasons of policy which support a rule that the premises considered by the expert should be expressly stated rather than left to speculation. It is preferable that these matters be clarified when the witness is examined-in-chief rather than leave room for argument later as to exactly what matters

> the expert had in his mind when expressing his conclusions: cf *Trade Practices Commission v Ansett Transport Industries (Operations) Pty Ltd* (1978) 20 ALR 31; 32 FLR 305, per Northrop J at p 329; *Trade Practices Commission v TNT Management Pty Ltd* (1985) 58 ALR 423; 6 FCR 1, per Franki J at 80-2. A
>
> It follows, in my view, that the evidence of Dr Williams is inadmissible. (Emphasis added.) B

When Walter Woon dated and signed his report (exh D28) on 23 October 1991, none of the defence witnesses had even begun to give evidence in this case. Tan Kok Liang gave his evidence-in-chief only on 28 October 1991 when he was partly cross-examined. There was then a long adjournment to 30 September 1994 when Tan Kok Liang absented himself. C So Walter Woon gave his evidence and was partly cross-examined that day and on 1 October 1994 when the case was adjourned to 27 December 1994 when Tan Kok Liang presented himself for cross-examination. After this, Walter Woon's cross-examination and re-examination was completed. Paul Latimer followed. Since Phillip Fung was called last, the testimony of both the defence experts could not incorporate anything he actually said. D

So far as Walter Woon's report dated 23 October 1991 is concerned, the only material given in the trial which he could refer to were the pleadings and the evidence of the plaintiff's witnesses. In the opening page of his report (exh D28), he said, 'This opinion is given on the basis of the facts as pleaded and takes no account of evidence which might be led in E favour of or in contradiction to any of the pleaded facts.' We find this statement very hard to reconcile with the report itself and especially para E on 'Market rigging, conspiracy and forward contracts' where his opinions were based on statements allegedly made in the prosecutions of Tan Koon Swan and Tan Kok Liang. F

We must also state that the facts set out in the case report of *PP v Tan Koon Swan* [1987] 1 MLJ 18 and the 'statement of facts' to which Tan Kok Liang may have admitted to in the trial in which he was also convicted in Singapore are emphatically not evidence in this trial. The document (ID 27) — if it had been admitted and to the limited extent that it G contained previous statements as to facts within Tan Kok Liang's own knowledge — could only be used to show consistency or to contradict his testimony in this trial (ss 145 and 157 of the Evidence Act 1950). In point of fact, ID 27 damaged Tan Kok Liang's credibility because nowhere in the document is there any suggestion that James Capel was in any way privy to the conspiracy between him and Tan Koon Swan to use S$59.5m H of Pan-Electric's funds to pay for the purchase of Tan Koon Swan's shares. If the defence regarded any of the facts in these documents as relevant, they had to be independently proved in the court below.

As for the rest of Walter Woon's report, it is observed that he hedged it with ifs and assumptions of facts as the foundation of the opinions he I was expressing. Professor Paul Latimer relied on the same inadmissible material when professing opinions about the alleged manipulative practices of the plaintiff's conduct.

Unless the experts and defence counsel can clearly point to uncontested or proven facts to support the opinions expressed, such evidence is of very negative value by reason of the confusion and prejudice it generates.

The legal issues to be decided in this case

We will now deal with each of the defendant's submission in the light of the established facts and the cases cited to us to the extent they are relevant.

The proper law

The defendant's counsel strove to submit that these contracts were made in Singapore because the transactions between the plaintiff and defendant started with a telephone call from Singapore by Lau offering to sell these shares to the defendant and the defendant accepting this offer in Ipoh.

We reject this submission. The sequence of events which we have already spelt out and the documents tendered by the parties conclusively prove that it was the defendant who initiated the move on 17 May 1985 pursuant to a pre-arranged plan that he would buy the GUH shares for Orange Grove and so instructed the plaintiff the same day. At the time, the plaintiff did not have the shares in stock. The bargain confirmation on 20 May conclusively proves that the plaintiff entered the defendant's buying order in its books on that day at a price fixed by the defendant. After confirming the bargain, the plaintiff had to buy the GUH shares from third parties, NOT from Pan-Electric or Tan Koon Swan.

We think that Phillip Fung's testimony that he thought the plaintiff was in London and that was why he noted their London address is unreliable because as from 20 May the defendant was in receipt of the plaintiff's Singapore note paper but was still using the London address in their stock cards for the GIH shares on 10 June 1985. Phillip Fung was found to be evasive by the trial judge. We think he did not tell the court the whole story. Although the trial judge got the date of the telephone conversation wrong, we think his decision on where the acceptance must be deemed to have taken place was correct.

The defendant's counsel's reliance on s 36 of the Sale of Goods Act 1957 to submit that these shares should be delivered in Singapore was misplaced. Taking possession or delivery to the buyer depends on the terms of the contract — express or implied. The defendant's effective stipulation upon the plaintiff was: 'buy for us 6m GUH shares'. The defendant's response was: 'we have today bought for your account', meaning the plaintiff placed 'buy' orders for the shares required. In a forward contract, the reality of the transaction is that the plaintiff had up to 21 November 1985 and 11 December 1985 to look for the shares. There is no telling where the shares were physically located until they had been identified on the date of delivery.

On the other hand, the terms of the defendant's dealer's licence would have required them to take delivery in Ipoh or issue delivery instructions out of their Ipoh office. It is an established fact that the breach of the GUH contract took place in Ipoh when the defendant refused to accept delivery. It is also an established fact that the defendant then obtained an extension of time for performance up to 3 December and paid RM2m towards the purchase price. By failing to pay the balance within the extended time, we think repudiation of the GUH contract occurred on or about 3 December 1985 in Ipoh.

To avoid confusion, we think it would be useful to remind ourselves that there is a clear distinction between jurisdiction and the issue of proper law. In the present case, the jurisdiction of the Malaysian court was not and cannot be challenged. Nor was it ever suggested by the defendant that Ipoh was a forum non conveniens. *Eng Liat Kiang v Eng Bak Hern & Ors* [1995] 1 SLR 577 was a forum non conveniens case, and dealt with the discretion of the courts to decline jurisdiction. So were *Amin Rasheed Shipping Corp v Kuwait Insurance Co* [1984] 1 AC 50, *Spiliada Maritime Corp v Cansulex Ltd* [1987] 1 AC 460 and *Inter Maritime Sdn Bhd v Kai Tai Timber Co Ltd Hong Kong* [1995] 1 MLJ 322. *MacMillan Inc v Bishopsgate Investment Trust plc & Ors (No 3)* [1995] 1 All ER 747 appears to have been a prelude to choice of forum. The facts of all these cases are very complex and far removed from ours where the plaintiff's cause of action is a simple one based on a breach of contract.

We agree with Mr Chandran that r 176(3) in Dicey & Morris' *Conflict of Laws* (12th Ed) Vol 2 pp 1231–1235 is irrelevant. This rule — which is based on art 4 of the Rome Convention on the 'applicable law in the absence of choice' — was only incorporated into the law of the United Kingdom in 1990 by the British Contract (Applicable Law) Act 1990 which came into force in the United Kingdom on 1 April 1991.

This issue must therefore be determined by common law principles set out in r 180 of Dicey and Morris' *Conflict of Laws* (11th Ed) Vol 1 p 1161 et seq, which the learned judge correctly applied.

Even so, the territory where the contract was made is only one of the relevant factors in the determination of the proper law of these contracts. In addition to those listed by the trial judge, we consider the following factors equally relevant, namely: (i) the defendant could only legally make them in Ipoh; (ii) the documents exchanged indicate an implied choice of Malaysian law; and (iii) the circumstances show that delivery and payment were required to be made and were in fact made in Ipoh where the breach occurred.

Were the contracts illegal under Malaysian law because they were forward contracts?

We thought so little of the defendant's submission on this issue that we told Mr Chandran he need not address us on this issue.

Once the trial judge found that the proper law was Malaysian law, he disregarded the entire evidence given by the defence witnesses on the alleged possible infractions of Singapore law which allegedly made the manner of the procurement of the shares in Singapore illegal.

A The only suggestion that the contracts were illegal under the rules of the KLSE came from the double somersault of Izlan Izhab in his further cross-examination in December 1994.

The trial judge rejected this 'about-face' as unworthy of credence. He likened it to 'nuances ... exquisite in the art and theatres' (see [1996] B 2 MLJ 97 at p 115). In our view also, En Izlan's evidence on the point is unworthy of belief.

Whether the contracts were illegal or otherwise is a matter for this court to decide. The trial judge found as a fact that these contracts were valid because prior to the KLSE circular, there was nothing in the KLSE C rules prohibiting such contracts.

We agree. We would go further and state that what the law does not specifically prohibit, it permits. Apart from Izlan's report made when he was the KLSE secretary, we also have the conduct of the KLSE on 18 December 1985 when it met all the directors of the defendant with their eminent legal adviser, Mr Sivalingam and thereafter ensured that the D defendant cleared its unfulfilled orders. It is too much to expect that if the KLSE thought then or at any time that these contracts were illegal it would not have taken appropriate action. Mr Phillip Fung gave evidence that he did not think he was doing anything illegal, not even when he arranged to assign all these contracts to Tan Koon Swan.

E There are two further legal reasons why the illegality alleged is irrelevant. The plaintiff is not a member of the KLSE and was therefore not bound by its rules. If there were any infractions by the defendant of the KLSE rules (and we can find none), it did not affect the plaintiff. The learned trial judge referred to *Theresa Chong v Kin Khoon & Co* [1976] 2 MLJ 253. This is a Federal Court decision by which we are bound. F *Huang Chang Hsun Francis v Hwang & Yusoff Securities Sdn Bhd* [1992] 2 MLJ 305 is relevant to the extent that the rules of the KLSE will apply to such transactions only to the extent that the parties have not contracted otherwise. Here, the parties had expressly contracted out of whatever was in the KLSE rules which were inconsistent with their private arrangements.

G The second reason why illegality is irrelevant turns on the propositions set out in *Bowstead and Reynolds on Agency* (16th Ed) at pp 334 and 335 where illustrations (5) and (11) read as follows:

> (5) *A* purchased shares as a broker, not being duly licensed as the law then required. Held, that he was entitled to recover from the principal the H price of the shares, which he was compelled to pay, such payment not being an essential part of the duty of a broker, although, in consequence of not being licensed, he could not recover any commission or remuneration: *Smith v Lindo* (1858) 4 CBNS 587.
>
> (11) *A*, intending to speculate, employs a broker to buy and sell stock on the Stock Exchange, the broker being aware that *A* does not intend to I accept the stock bought, or deliver the stock sold, on his behalf, but expects the broker to arrange that only differences shall be paid or received. The broker makes the contracts on *A*'s behalf, and becomes personally liable on them. The broker is entitled to indemnity, because the transactions entered into by him on the Stock Exchange are real contracts for the purchase and sale of stock, and not gaming or wagering contracts. But if the broker agrees with the persons with whom he

> contracts on behalf of this principal, or if it is the intention of both parties to the contract that stock or shares shall be bought or sold, but only differences paid or received, it is nonetheless a wagering contract though there is a superadded provision that either party may at his option require completion: *Universal Stock Exchange v Strachen* [1896] AC 166; *Re Gieve* [1899] 1 QB 794; *HW Franklin & Co Ltd v Dawson* (1913) TLR 479. But the position is altered by the Financial Services Act 1986: see *City Index Ltd v Leslie* [1992] QB 98. *On the other hand, if either party intends that stock or shares shall be delivered and paid for, the contract is not a wagering contract, even if it provides for the payment of an enhanced price in the event of the stock or shares being taken up*: *Philp v Bernett & Co* (1901) 18 TLR 129. These cases are retained here on account of their general significance: present-day procedures are, however, different. See s 63(1) of the Financial Services Act 1986. (Emphasis added.)

When we drew these to his attention, the defendant's counsel had no satisfactory answer. *Philp v Bernett & Co* (1901) 18 TLR 129 is specially significant because the plaintiff sold the GUH and GIH shares at an enhanced price of about 1% more than what it paid for them.

As far as we know, there is no equivalent legislation to the British Financial Services Act 1986 — see s 63(1) in Malaysia (or Singapore) — but this has a bearing in operation on the public policy submission made by the defendant.

Were the contracts void or unenforceable in Malaysia by reason of public policy or because it was contrary to s 84 of the Malaysian Act?

Section 84 of the Malaysian Act is relevant to the alleged false trading and market rigging.

Section 24(e) of the Contracts Act 1950 states that the consideration or object of an agreement is lawful unless:

> (e) the court regards it as immoral or opposed to public policy.

There is not a shred of evidence that the defendant and the plaintiff (or Phillip Fung and Lau) had agreed between them to create a false or misleading appearance of active trading in GUH and GIH shares on the KLSE or anywhere else. Indeed, no such suggestion was put to Guarnori. And Phillip Fung confirmed that the defendant's purchases were off-board transactions which were not reported to the KLSE until after the collapse.

The reports and evidence of Profs Woon and Latimer made very heavy weather on policy issues of forward contracts, market rigging, manipulation and so on but these highly prejudicial and defamatory perorations had no probative value against the plaintiff whatsoever because no evidence had been given in this case to show that the plaintiff was party to Tan Koon Swan's scheme.

Indeed, the evidence given goes the other way. Section 100 of the Malaysian Act gives the registrar power to apply to the High Court for restraining orders against persons offending against the Act and nullfying contracts made in breach of this Act or any other Malaysian law relating to dealing in securities. It is highly significant that the defendant did not produce any evidence or even suggest that the KLSE had taken any action to get the registrar to initiate any proceedings in the full knowledge of all that happened in YK Fung Securities Sdn Bhd. Instead, the KLSE instructed and authorized Izlan Izhab, its secretary, to file a report (exh P1) in this case to say that no offence had been committed and forward contracts were not illegal!

Theresa Chong v Kin Khoon & Co [1976] 2 MLJ 253 had another aspect to it which formed the ratio decidendi of that case. There it was held by the Federal Court that a violation of the rules of the KLSE had occurred. Nevertheless, the Federal Court held that the contract was valid and not illegal.

It was strenuously submitted that we should not follow this decision because it was too narrow and that the categories of contracts which are contrary to public policy are not closed. The defendant's counsel referred us to the articles 'Public Policy under the Contracts Act 1950' [1981] JMCL 1 by Prof Visu Sinnadurai (as he then was), especially his comments at pp 14–20 and the Indian authorities therein referred to.

In *Theresa Chong*, Gill CJ (Malaya) did refer to the dicta of Asquith LJ in *Monkland v Jack Barclay Ltd* [1951] 2 KB 252 at p 265 which reads:

> The courts have again and again said that, where a contract does not fit into one or other of these pigeon holes, but lies outside this charmed circle, the courts should use extreme reserve in holding such a contract to be void as against public policy, and should only do so when the contract is incontestably and on any view inimical to the public interest ... .

In *Gherulal Parakh v Mahadeodas Maiya & Ors* AIR 1959 SC 781, Subba Rao J said the same thing at p 795:

> ... this doctrine of public policy is only a branch of the common law, it is governed by precedents; the principles have been crystallized under different heads and though it is permissible for courts to expound and apply them to different situations, it should only be invoked in clear and incontestable cases of harm to the public; though the heads are not closed and though theoretically it may be permissible to evolve a new head under exceptional circumstances of a changing world, it is advisable in the interest of stability of society not to make any attempt to discover new heads in these days.

And where did the defendant's counsel look for material to contend that it had been proven by evidence in this case that these contracts were 'inconsistently and in any view inimical to public interest'?

He literally threw Prof Latimer's report from pp 244–252 at the head of this court. We feel the need to remind all concerned that we should be ever vigilant not to allow ourselves to be bamboozled by the pronouncements of an expert, however eminent, unless there is hard evidence in the case being tried to support the expert's conclusions. The decision of *PP v Tan Koon Swan* was in personam; and the facts reported in that judgment do not prove themselves in this case. Tan Kok Liang's account of what he did was evidence only against himself and Phillip Fung whom he implicated. Michael Huang and Tan Koon Swan were not called. Not only was there no evidence, the so-called facts on which Prof Latimer relied were not even pleaded. In any event, there was nothing Tan Kok Liang said which could be taken as evidence against the plaintiff.

One other feature of this aspect of the matter was that despite the existence of s 84 of the Malaysian Act against false trading and market rigging transactions (and its parallel provisions in the Singapore Act) and the material which was at the disposal of the KLSE, the SSE and the MAS, nobody gave evidence of any prosecution of the alleged miscreants under s 84 of the Malaysian Act or its counterpart in Singapore. The penalty for the offence under s 91 is a mandatory fine of not less than RM1m and imprisonment for 10 years.

For all the millions lost and the catastrophic damage said to have been caused by the alleged machinations of Tan Koon Swan and Tan Kok Liang, these people were charged and convicted in Singapore of criminal breach of trust of a comparatively small sum of S$144,852.68 of the funds of Pan-Electric.

No suggestion was made by any of the defendant's witnesses that any of the participants in this debacle had been prosecuted for an offence under the Securities Industry Act of either territory in relation to the facts of this case.

It is not without interest that despite their much-vaunted expertise, neither of the defence experts touched upon the impact of the passages from *Bowstead* or any of the authorities therein to which we referred earlier, or for that matter, to s 63(1) of the United Kingdom Financial Services Act 1986 which specifically provides that:

> 63 (1) No contract to which this section applies shall be void or unenforceable by reason of —
>
> (a) s 18 of the Gaming Act 1845, s 1 of the Gaming Act 1892 or any correcting provisions in force in Northern Ireland; ...
>
> (2) This section applies to any contract entered into by either or each party by way of business and the making or performance of which by either party constitutes an activity which falls within para 12 of Sch 1 to this Act or would do so apart from Pts III and IV of that Schedule.

The relevant words in para 12 of Sch 1 to this Act are:

> Buying, selling ... investments, or offering or agreeing to do so either as principal or agent.

The learned trial judge also criticized the defence for trying to make a mountain out of a molehill in alleging that the brokers and Tan Koon Swan were involved in a roll-over which was 'an illegal scheme of funding by Pan-El directors'. Curiously, s 63(1) of the United Kingdom Finance Act 1986 recognizes such schemes to enable fulfilment of a contract as being both legal and eligible to tax relief. Section 61(1), (2) and (3) reads:

> 61 (1) Subject to sub-s (5) below, this section applies where a person (A) has contracted to sell securities and, to enable him to fill the contract, he enters into an arrangement under which —
>
> (a) another person (B) is to transfer securities to A or his nominee; and

> (b) in return securities of the same kind and amount are to be transferred (whether or not by A or his nominee) to B or his nominee.
>
> (2) Subject to sub-s (5) below, this section also applies where, to enable B to make the transfer to A or his nominee, B enters into an arrangement under which —
>
> (a) another person (C) is to transfer securities to B or his nominee, and
>
> (b) in return securities of the same kind and amount are to be transferred (whether or not by B or his nominee) to C or his nominee.
>
> (3) Any transfer made in pursuance of an arrangement mentioned in sub-s (1) or (2) above shall not be taken into account for the purposes of the Tax Acts in computing the profits or losses of any trade carried on by the transferor or transferee.

The defence's attempt to invoke public policy was devoid of any merit.

Did the documentation issued by the plaintiff or the manner of procurement of the shares offend against the terms and conditions of the plaintiff's dealer's licence in Singapore and if so, did it make the contracts unenforceable in Malaysia?

To his credit, the plaintiff's expert Mr Lim Chor Pee rigorously confined his evidence to the documentary evidence produced in the case. Much as we were impressed by the manner in which he gave his evidence, we think the learned trial judge was correct in disregarding the suggested infractions of the dealer's licence and the documentary inadequacies in Singapore because once it was held that Malaysian law applied, the evidence of all the experts became irrelevant. In the event that a different view should be taken if this matter goes any further, we now make the following observations.

Initially, it must be emphasized that the defendant's counsel both here and in the court below were unable to support any of their contentions by reference to any decided cases in Singapore which could be said to be on all fours with the present problem. Experts can, of course, testify to the statutes and judicial decisions of another sovereign state. We should, however, be very wary of opinion evidence which purports to predict how a foreign court will decide on issues which have not come before it.

Having already held that the plaintiff was a licensed dealer at all material times, the first issue to resolve is what the plaintiff should legally have done when the defendant placed the order to buy these shares.

The relevant words in the licence read:

> 3 That the licensee shall ... in the case of securities, including foreign securities, quoted on the Stock Exchange of Singapore Ltd ... deal in them only through licensed dealers who are members of the Stock Exchange of Singapore Ltd.

We reject the defence's contention that when the defendant placed its buying order with the plaintiff, the plaintiff should have refused to deal with the defendant except to direct the defendant to a qualified third party. Condition 3 expressly authorizes the plaintiff to deal. It could therefore accept the order and execute it in the manner specified.

The next issue is what documentation the plaintiff was required to issue when it accepted the defendant's order. Is a 'bargain' the same thing as a contract when the parties are in a broker-to-broker relationship for the purchase of shares, bearing in mind that a broker's authority to buy shares can always be revoked at any time before it has been acted upon?

Regulation 19 of the Securities Industry Regulations 1974 was alleged to have been infringed (this regulation is similar, but not identical, to s 38 of the Malaysian Act). The complaint is that the plaintiff did not issue a 'contract note' when it issued the bargain confirmation. The answer to this is that both the plaintiff and the defendant were fully aware that all the elements of the two transactions could not be concluded at one go. In the case of the GUH shares, they extended from 17 May 1985 to June 1985. The corresponding period for the GIH shares was 10–14 June 1985.

In *Sykt Soon Theam Sdn v H'ng Chye Jin* [1975] 1 MLJ 259, Chang Min Tat J (as he then was) said this at p 260:

> The defence was based on the contract law of offer and acceptance and it was submitted that in the absence of any acceptance of the offer, there was no valid contract between the plaintiff and the defendant by which the defendant was obliged to take up the shares. It was also said that the plaintiff owed a duty to the defendant to mitigate the loss and should, immediately on the notice that the defendant objected to the transaction, have sold the shares.
>
> With very great respect, I am of the opinion that the submission at law is not well-founded. A sharebroker is by his designation not a contracting party but is an agent who arranges for the 'marriage' of an offer to buy with an offer to sell. For this brokerage he gets a commission. *Taylor v Stray* (1857) 2 CBNS 175; 140 ER 380 and *Seymour v Bridge* (1885) 14 QBD 460 are, I consider, sufficient authorities for the proposition that once a broker had received an order from his client, his authority to complete it and so rid himself of the personal liability undertaken by him within the rules of the stock exchange cannot be revoked. The authority could of course always be revoked at any time before it had been acted upon: see *Fletcher v Marshall* (1846) 15 M & W 755; 153 ER 1055.
>
> The evidence however in this case is that the authority had already been acted upon before revocation of the order for the 7,000 balance and therefore the defendant is bound.
>
> In so far as mitigation is concerned, on the authority of *Thacker v Hardy* (1878) 4 QBD 685 (CA) the broker who had bought securities for his client is under no obligation to re-sell them.

The reference in the footnote of the plaintiff's 'bargain confirmation' to the place where the 'bargain was executed' could also mean where the relevant document was signed. In any event, this was superseded by the defendant's last letter confirming the terms by which it elected to be bound: *BP Exploration (Libya) Ltd v Hunt* [1976] 3 All ER 879 and note 11/1/14 in the Supreme Court Practice 1997.

The defendant's expert, Prof Woon conceded that there was no prescribed form for a contract note under the regulations. It was only after the bargain was confirmed that the parties proceeded to settle all the terms and conditions for the purchase of these shares. The 'contract note' in this case has to be found in the last two letters exchanged by the parties in respect of each contract.

The object of these contract notes is to ensure transparency so that the client is given the requisite information. We are here concerned with two seasoned brokers who knew all there was to know about the regulations and the practice and customs of the market. The defendant chose to exclude the terms and conditions of the SSE altogether. In so far as the terms and conditions of the KLSE are concerned, the defendant chose to exclude them also to the extent they were inconsistent with the contracts. The defendant cannot be heard to complain that no contract note was issued simultaneously with the bargain confirmation because that was practically impossible. In our view, the plaintiff complied with reg 19, because as soon as all the terms and conditions of the contracts crystallized they did do so. 'Forthwith' means as soon as practicable: see *HA Securities v Ng Kong Yeam* [1993] 3 MLJ 489 and cases referred to in the *MLJ Words and Phrases Judicially Defined.*

Anderson Ltd v Daniel [1972] 1 KB 138 — so heavily relied upon by the defendant — was distinguished in *Shaw v Groom* [1970] 1 All ER 702. Even assuming there was some technical infraction of reg 19 (and we can see none), we think that in so far as these cases are persuasive, *Shaw v Groom* is the preferred guide.

Upon conviction for any breach of the regulations, the only penalty provided by reg 13 is a fine not exceeding S$1,000. There is nothing in the Act or the regulations which states in so many words that if a contract note was deficient in some respect — or indeed not issued at all — the contract is prohibited. Nor is there anything in the Act or regulations which requires it to be so construed. So in our view the alleged breach could not invalidate the contract.

FAI Insurance Ltd & Anor v Pioneer Concrete Services Ltd & Ors [1986] 4 ACLC 698 was cited to urge us to take the view that compliance with reg 19 was a condition precedent to the buyer's liability. No matter how hard the words in that case are squeezed, we do not think it will support this argument. That case turned on an alleged breach of s 42 of the Securities Industries Code which has no equivalent in the Singapore Act.

How the plaintiff went about procuring the shares requested to fulfill the defendant's order is also fully documented and these documents were fully disclosed by the plaintiff to the MAS with its letter dated 3 September 1986. Indeed, after the Pan-Electric collapse, the plaintiff's Mr Church had already met Mr Tan of the MAS and discussed their problems with the defendant. As indicated earlier, the truth of the contents of the MAS letter was not proved by this reply. The fact that after full disclosure the MAS did not disapprove of what the plaintiff did is admissible The plaintiff pleaded the letter. These contracts are not ex facie illegal. The party alleging illegality of a contract or the manner of its performance bears the legal burden of proving this fact.

The defendant did not produce evidence to counter the plaintiff's documents. On the facts before us, we hold the plaintiff did everything the law properly required them to do in purchasing the required shares in Singapore through licensed dealers who were also members of the SSE.

The submission that by failing to disclose that the plaintiff was dealing as principal it had breached s 34 of the Singapore Act

Paragraph 25 of the defendant's outline submission dated 13 May 1996 reads:

> Non-disclosure of dealer that he is dealing as principal (not pleaded in defence or memorandum of appeal).

It was not pleaded in the defence because the defendant was not allowed to do so by the learned trial judge. The defendant appealed and the Supreme Court also refused leave. In spite of this, the defence counsel ran the argument in the court below and the learned trial judge regarded this as an abuse of process.

But once again, the matter was raised in ground 5(ii)(b) of the memorandum of appeal. It will be noted that in para 5(ii)(a) the defendant alleged that the plaintiff was acting as agent and in 5(ii)(b) it alleged the defendant was acting as principal!

Leaving aside these acrobatics, it is not irrelevant to record that the abortive fourth attempt to amend the defence to include these contradicting defences was only made in October 1991. Walter Woon's opinion is dated 23 October 1991. It is hard to avoid the impression that his opinion inspired this move on the part of the defendant's solicitors.

Admittedly, the bargain confirmation does not specifically disclose whether the plaintiff was acting as agent or principal but if all the documents which went to make up these two transactions are looked at, starting with the defendant's stock cards dated 17 May 1985 and ending with the defendant's letter dated 24 June 1985 confirming the GUH contract, it is manifestly clear that there was express disclosure that the plaintiff was acting as principal.

To begin with, r 40 of the SSE — which no doubt had its counterpart in the rules of the KLSE — states that:

> 40 (1) Member Companies shall be deemed as between themselves to contract as principals, whether the Contract Notes state expressly that they are acting only as brokers or not.
>
> (2) In any case where a Member Company shall, in the opinion of the Committee, be acting as agent for a bona fide purchaser (the onus of proof thereof shall be on such member Company) no liability shall attach to such Member Company in respect of calls on shares in limited liability companies due subsequent to the date of delivery unless such liability is expressly reserved in the Contract Note.

What came after the bargain confirmation were the letters setting out the terms and conditions. The relevant words in the plaintiff's letters (inverted in the defendant's responses) were, 'the purchase by you from us,' and not 'the purchase by us on your behalf'. The third condition which stipulated that the transaction was on a cum-all basis made it obvious that both parties agreed it was a principal-to-principal transaction because all rights and liabilities between that date up to the delivery date was for the defendant's account. But (and this is important) rights issue not taken up by the defendant could be taken up by the plaintiff for its own benefit or renounced.

Section 34(3) of the Singapore Act — which is the linchpin of this defence submission — is only available if the defendant did not dispose of the securities after purchasing them from the plaintiff. They did so dispose of them, as regards the GUH shares by the contract notes to Orange Grove on 17 May 1985 followed by Mandy Fung's confirmatory letter to Orange Grove on 10 June 1985; as regards the GIH shares by their contract notes to Orange Grove and Eastronics dated 10 June 1985 followed by the confirmatory letters dated 11 June 1985; and in any case, by a further disposal of both lots by the novation agreement with Tan Koon Swan dated 28 December 1985.

Consequently, it was idle to contend that s 34(3) had any relevance to the facts of this case. See also the Canadian appeal case to the Privy Council, *Solloway v McLaughlin* [1938] AC 247, where the brokers — in their capacity as the plaintiff's agent — fraudulently sold the shares deposited by the client as margin, falsely told the client they had bought the shares he had ordered, issued fictitious contract notes and in a falling market marked up all the losses to the client while secretly marking up the profit to themselves.

The uncontested evidence in our case is that after the contracts were made, the plaintiff bought the shares and paid for them. All the defendant put at risk was their written undertaking that when the time came for delivery, it would accept and pay for them.

Was the defendant's submission that only nominal damages should be awarded correct?

The learned trial judge said that the plaintiff did not adduce evidence to ask for damages in addition to the claim for the balance of the purchase price. The statement of claim pleaded breach of contract and the prayer specifically claimed S$24,711,983.56, damages for breach of contract, interest and further or other relief.

In his evidence, PW2 Guarnori put in the bargain confirmations issued to the parties from whom the plaintiff bought the GUH shares, the dealing slips, the plaintiff's calculations and the contract notes issued by Messrs Kay Hian. The prices at which the plaintiff bought their shares were fully disclosed to the court. His evidence was as follows:

> We did not take steps to dispose of the shares according to selling procedure. Pan-Electric had collapsed and the market had closed and those GIH and GUH shares were worthless ... . We took shares from sellers and paid for them and we had to rely on the buyer to pay for the same.

Attempted delivery of the GUH shares took place on 21 November 1985. Since the defendant obtained accommodation by making part payment, the breach must be deemed to have taken place on 3 December 1985 by which time the defendant failed to come up with the full balance. The agreed facts makes it unarguable that the defendant did not accept delivery of the GIH shares on 11 December 1985. A

The onus of proving that there was a market for the GUH or GIH shares on the date of the breach (or, for that matter, at any time thereafter) passed to the defendant. It was for the defendant to challenge Guarnori's evidence that the shares were worthless. B

It was quite incorrect for the defendant's counsel to suggest that the learned trial judge had made an order granting the plaintiff specific performance and that he had given this relief by relying on the Sale of Goods Act 1957 ('the SOGA'). The true position is that he only referred to the SOGA to support his view that the place of delivery of the shares was Ipoh. The judicial process of reasoning by which the learned trial judge quantified the sum payable to the plaintiff and made his other order for the return of the unsold shares after payment is not disclosed in the judgment save that he held there was no reason why this should be disallowed since the plaintiff had proved its claim. C D

We think that the title to these shares remained with the plaintiff because the terms of the contract provided for title to pass only on delivery although payment according to the terms stipulated by the defendant was to follow only a day later. We do not think that anything turns on this because by 3 December 1985, it had become obvious that the defendant was never going to take delivery and/or pay. E

In these circumstances, the plaintiff's remedy fell to be determined under s 56 of the SOGA which states that:

> Where the buyer wrongfully neglects or refuses to accept and pay for the goods the seller may sue him for damages for non-acceptance. F

This suit was not framed as a claim for price under s 55 of the SOGA nor could it be treated as such because property in the goods had not passed as required by s 55(1) and the price was not payable irrespective of delivery as required by s 55(2). This was not a suit for specific performance either because the statement of claim made it clear that the plaintiff gave notice of its intention to resell the shares and give credit thereafter. The money claimed was S$24,711,983.56 or such other liquidated sum due at the date of judgment. Indeed, as Lord Wilberforce said in *Johnson & Anor v Agnew* [1980] AC 367 at p 392: G

> ... if the vendor treats the purchaser as having repudiated the contract and accepts the repudiation, he cannot thereafter seek specific performance. This follows from the fact that, the purchaser having repudiated the contract and his repudiation having been accepted, both parties are discharged from further performance. H

So the remedy was in damages pure and simple subject to such mitigation as the plaintiff was able to achieve. This is the correct remedy. Benjamin on *The Sale of Goods* (4th Ed) at p 773 states: I

> If the seller claimed the price, the court or arbitrator may nevertheless award him damages if it holds this is his correct remedy (*Mediterranean East Export Co Ltd v Fortress Fabrics (Manchester) Ltd* [1948] 2 All ER 186).

A It is disappointing to see the s 34 rescission argument being raised again before us despite the trial judge's strictures that this line cannot be pursued. We reiterate that the *Mihalis Angelos* principle was never open to the defendant. Because the plaintiff was acting as principal, the defendant had no right of rescission; and even if it did, it lost that right when it B disposed of the shares to Orange Grove and Eastronics.

The defendant's counsel also attacked the award on the ground of alleged insufficiency of evidence on the extent of the actual damage sustained by the plaintiff.

The applicable principle for the present purposes is clearly spelt out C in 1 *Chitty on Contracts* (26th Ed) para 1817. It reads:

> Where the buyer refuses to accept the shares, the seller may recover the difference between the contract price and the market price on the day fixed for completion: *Jamal v Moola Dawood & Co* [1916] 1 AC 175. If the seller retains the shares after the breach, the speculations as to the way the market will subsequently go is the speculation of the seller, not the buyer; the seller D cannot recover from the buyer the loss below the market price at the date of the breach if the market falls, nor is he liable to the purchaser for the profit if the market rises.

On the day fixed for the completion, ie 3 December 1985, the market price of the shares was nil. So the damages the plaintiff was entitled to on that E date and 11 December 1985 was the full balance of the contract price. The congruence between this figure as damages and as balance of the contract price did not detract from the character of the suit.

There is extensive discussion by textbook writers on what the courts should do where the goods have a market value on the date of the F breach but the seller deliberately retains the goods and sells them after a delayed period at a price which is not the price at which he could have sold on the date of the breach: see Atiyah on *The Sale of Goods* (9th Ed) at pp 590–591, and Benjamin (4th Ed) para 16–065 (note 42) which we need not get into because, so far as the assessment of damages is concerned, any subsequent variation of price after the date of the breach is irrelevant. G The starting point therefore is the value of the shares on 3 and 12 December. On those dates, the shares were valueless. So the plaintiff was entitled to claim the full amount of money required on those days to compensate for what it should have got if the defendant paid.

Of course the plaintiff must mitigate, but contrary to the defendant's H submissions as Benjamin states (4th Ed) para 16-044 at p 806:

> ... and the onus of proof is on the defendant, who must show that the plaintiff ought, as a reasonable man, to have taken certain steps to mitigate his loss: *Roper v Johnson* (1873) LS 8 CP 167; *Pillkington v Wood* [1953] Ch 770. But since the defendant is a wrongdoer, in breach of contractual I obligation, the standard imposed on the plaintiff is not a high one. Thus the plaintiff is not 'under any obligation to do anything other than in the ordinary cause of business'; nor need to take risks with his money in attempting to mitigate nor take steps which might endanger his own commercial reputation, nor need he sacrifice any of his property or rights in order to mitigate the loss caused by the defendant's breach.

Having already repudiated the contracts — both by conduct in December 1985 and then by their subsequent pleadings, and the purported rescission on 7 June 1991 — the letters written by the defendant's solicitors in early March 1994 requiring the plaintiff to renounce the rights issue for the GUH shares in favour of the defendant are indicative of a continued refusal to pay for the cake they wanted to have and eat. The plaintiff's solicitor's response on 1 March 1994 was to offer to sell the GUH shares to the defendant on terms mutually acceptable. The defendant declined. The plaintiff then sold to third parties and gave notice thereof to the defendant's solicitors, inviting further negotiations as regards the unsold shares. Mr Chandran in his closing submission gave details of the sales. Mr Chan objected to the admissibility of these facts (see para 18 of the defendant's counsel's reply). Since there was no proof of mitigation, he contended the damages should be nominal.

Before us, this submission was strenuously repeated. Some oblique references were made by the defendant's counsel to the plaintiff's alleged duty of care to get the best possible price for the unsold shares and it was submitted that the absence of evidence of mitigation had left the plaintiff's possible dereliction in this area unexplored. The defendant's counsel went so far as to say that the court should act on the basis that there was therefore no proof of damages at all. He also said that the plaintiff should have made a formal application to re-open its case after the defence had closed and that the plaintiff should have sought leave to lead evidence of mitigation. With respect, this submission was misconceived for several reasons:

(i) as pointed out earlier, the plaintiff's damages was the equivalent of the balance of the purchase price because on the date of the breaches the shares were worthless;

(ii) this situation continued till the plaintiff closed its case. Thereafter, GUH Bhd was resurrected and its shares became marketable. The GIH shares continued to be worthless;

(iii) as soon as there was a change for the better in GUH, the plaintiff gave the defendant the first option to buy which the defendant declined;

(iv) the onus of proving the extent to which the loss could be mitigated was upon the defendant;

(v) not only did the defendant not lead any evidence as to this, it raised technical objections to the admissibility of the plaintiff's counsel's disclosures from the Bar table as to the extent to which the plaintiff had mitigated; and

(vi) as earlier pointed out, there was no general duty to hold on to the shares after the date of breach in order to get the best price because the measure of damages for a buyer's refusal to accept shares is the difference between contract price and market price on the date fixed for completion. To this extent, any oblique reference to a mortgagee's alleged duty to obtain the best price possible on a sale of charged properties is fallacious (see the Court of Appeal decision in *Malayan Banking Bhd v Lim Poh Ho & Anor* [1997] 1 MLJ 662).

By compelling the trial judge and this court to shut its eyes to the sales of the GUH shares between 31 March 1994 and 14 September 1994, the defendant had literally hoisted itself on its own petard because it left us no choice but to set aside the third and fourth orders made by the learned trial judge.

The plaintiff had claimed interest under s 11 of the Civil Law Act 1956 from the date the causes of action arose, in addition to interest at 8% from the date of the order till realization. We must confess that when we dismissed this appeal, it had escaped our attention that the learned trial judge had omitted to grant the plaintiff interest from the date the causes of action arose or at least from the date the writ was filed. There is every reason why this should have been awarded since the plaintiff has been kept out of S$24,711,983.56 since December 1985. Interest on this at 8% till the order on 27 November 1995 (say 10 years) is S$19,769,586.40, whereas interest on the hypothetical sum of RM5,679,645 at 8% per annum is only RM454,371.60.

Yet again, the trial judge envisaged that the defendant would honour his order and pay up before 27 November 1995. This has not yet happened. If the defendant refuses to pay altogether, the second order becomes academic because the plaintiff must sell the remaining shares if marketable and levy execution or go for winding up.

On the hypothetical basis that on 14 separate dates between 31 March 1994 and 14 September 1994 the plaintiff sold 14 separate lots of new GUH shares totalling 1.3m shares for RM5,679,645, it means the plaintiff will have benefited by this progressive capital reduction of the total damage claim, and also the interest accruing thereon till a month after full settlement by the defendant of the decretal sum and interest. Since the date of the order on 27 November 1995, there will therefore be an overlap of interest because strictly speaking on the hypothetical basis aforesaid, the decree should only have been for S$24,711,983.56 less the Singapore dollars equivalent of RM5,679,645 with interest thereon at 8%. These are complicated calculations which we were not equipped to handle. If the party found liable is uncooperative in helping to resolve them, the court will be left to do rough justice.

The trial judge's orders do not disclose the process of reasoning by which he adjusted the competing claims of the parties in respect of the interest element. Clearly, he intended there should be a trade-off between the absence of any provision for interest under s 11 of the Civil Law Act 1956 and not giving the defendant any credit for interest on the proceeds of sale actually realized from the new GUH shares.

For obvious reasons, courts should not make orders requiring continuous supervision of the actions of the parties. We had to set aside the third and fourth orders because the conduct of the defendant had made them quite impractical. Taken together, the first four orders were predicated upon the foundation that the defendant would pay the entire balance due within a month. The trial judge did not indicate what was to happen if the payment was not made and we did not find it possible to make any orders in the event of this contingency because the required information has not been furnished.

In the circumstances, we consider the effect of setting aside the third and fourth orders would be that immediately upon the failure of the defendant to comply with the first order in the time limited, the plaintiff will be able to sell off the remaining saleable shares and levy execution for the balance.

If the defendant does pay up as per the first order, the parties are now given liberty to apply for directions to work out the second order.

In either event, a separate application will now be required as to the disposal of the RM5,679,645 realized on the sale of the new GUH shares and the competing claims for interest under s 11 of the Civil Law Act 1956 and the defendant's right to set-off interest accruing due on this sum, bearing in mind that this right of set-off will only arise after the plaintiff's claims on the first order have first been satisfied. If the foregoing provisions are not very tidy, we regret it is the best we could do in this difficult situation.

Conclusion

We were unanimous in our decision to dismiss this appeal. We agree with the learned trial judge that it was needlessly protracted. If we have taken some time to come out with this judgment, let us say in mitigation that the total absence of any cross-references from the exhibits referred to in the notes of evidence to the documents in the second volume of the appeal record and the absence of any discernible order in their arrangement exacerbated our difficulties. The ingenuity involved in creating this maze of technical defences has already delayed the plaintiff's cry for justice for 11 years. If only as a concession to human mortality, we hope that the final judicial resolution of this matter will not take much longer.

Appeal dismissed.

Reported by K Tang-Wai